Lincoln Center for the Performing Arts, Inc. *and* Local 100, Hotel Employees and Restaurant Employees International Union, AFL–CIO. Case 2–CA–32983

November 28, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On April 1, 2002, Administrative Law Judge Steven Fish issued the attached decision,* and on June 20, 2003, the judge issued the attached supplemental decision.[1] The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply to the General Counsel's and the Charging Party's answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Lincoln Center for the Performing Arts, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating rules prohibiting the distribution of leaflets or the engaging in of any other protected concerted activity on the Columbus Avenue sidewalk, or enforcing prior rules more stringently, in order to discourage protected conduct by representatives of Local 100, Hotel Employees and Restaurant Employees International Union, AFL–CIO (Local 100).

(b) Evicting, attempting to evict, threatening to arrest, or otherwise prohibiting Local 100 representatives from distributing leaflets on the Columbus Avenue sidewalk while allowing nonunion individuals to engage in the same conduct.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its rule prohibiting the distribution of handbills or leaflets on the Columbus Avenue sidewalk.

(b) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the

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* The judge inadvertently misidentified several dates and one name in his decision and supplemental decision. In the judge's original decision, we shall substitute "Cottam" for "Katom" at p.4, l.22. In the supplemental decision, we shall substitute "2000" for "2002" at p.3, l.24, and "2000" for "2001" at p.8, l.42, p.12, l.45, p.13, l.14, and p.15, l.5.

[1] On July 17, 2002, after the judge issued his original decision, the Board granted the Respondent's motion to reopen the record to provide the Respondent an opportunity to adduce evidence that Dennis Diaz allegedly committed perjury while testifying during the original hearing.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We adopt the judge's findings that the Respondent violated Sec. 8(a)(1) by promulgating its no-leafleting policy to discourage union activity, and by discriminatorily enforcing its policy on May 11, 2001. In view of these two bases for finding a violation, we deem it unnecessary to pass on a third possible basis for finding a violation, i.e., that the Respondent violated Sec. 8(a)(1) by excluding and attempting to exclude union leafleters without having a property right entitling it to do so.

We also find it unnecessary to pass on the judge's additional finding that the Respondent violated Sec. 8(a)(1) by discriminatorily enforcing its no-leafleting policy on June 28, 2001, and the subsidiary finding that Sec. 10(b) did not bar the General Counsel from including that allegation in the complaint. The finding of a violation on June 28, would be cumulative of the other violation found on May 11, 2001, and would not materially affect the remedy.

In adopting the judge's finding that the Respondent discriminatorily enforced its no-leafleting policy on May 11, 2001, Chairman Battista notes that the Respondent does not argue that it draws a distinction between charitable and noncharitable solicitations. See, e.g., *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 465 (6th Cir. 1996).

[3] We shall revise the judge's recommended Order to include language more closely tracking the violations found and to eliminate duplicative language. We shall also substitute a new notice to conform to the language in the Order.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 26, 2001.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 2, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 28, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate rules prohibiting the distribution of leaflets or the engaging in of any other concerted activity on the Columbus Avenue sidewalk, or enforce prior rules more stringently, in order to discourage protected conduct by representatives of Local 100, Hotel Employees and Restaurant Employees International Union, AFL–CIO (Local 100).

WE WILL NOT evict, attempt to evict, threaten to arrest, or otherwise prohibit Local 100 representatives from distributing leaflets on the Columbus Avenue sidewalk while allowing nonunion individuals to engage in the same conduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind our rule prohibiting the distribution of handbills or leaflets on the Columbus Avenue sidewalk.

LINCOLN CENTER FOR THE PERFORMING ARTS, INC.

Christene Mann, Esq., for the General Counsel.

Jamin Sewell, Esq., of New York, New York, for the Charging Party.

Peter R. Conrad, Esq. (Proskauer, Rose LLP) and Evelyn Finkelstein, Esq., of New York, New York, General Counsel for Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges filed by Local 100; Hotel Employees and Restaurant Employees International Union, AFL–CIO, herein called the Union or Local 100, on May 9, 2000, [1] the Acting Director for Region 2, issued a complaint and notice of hearing on March 30, 2001, alleging that Lincoln Center for the Performing Arts, Inc., herein called Respondent, violated Section 8(a)(1) of the Act. The trial with respect to the allegation in said complaint was held before me on July 11, 12, and 25, 2001. Briefs have been filed by General Counsel and Respondent, and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a not-for-profit corporation with an office and place of business located at 70 Lincoln Center Plaza, New York, New York, where it is engaged in the business of operating Lincoln Center for the Performing Arts. Annually, Respondent derives gross revenues in excess of $1,000,000 and purchases and receives at its New York City facility products goods and materials valued in excess of $10,000 directly from points located outside the State of New York.

It is admitted and I so find, that Respondent is and had been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

It is also admitted, and I so find that Local 100 is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates hereinafter referred to are in 2000, unless otherwise indicated.

II. FACTS

A. The 10(b) Issue

Local 100's charge, filed on May 9, alleges in substance that since May 3, Respondent has threatened to file criminal trespass charges against Local 100's agents for engaging in protected activities "on the city sidewalks outside the Lincoln Center campus, without having a property interest which entitles it to do so."

During the course of the investigation of the instant charge, Respondent filed a Statement of Position dated June 27, which dealt with the events of May 11. Subsequently, the charge was sent to the Division Advice.

The complaint which was issued on March 30, 2001, alleges that (1) Respondent unlawfully implemented and maintained a policy against leafleters on the Columbus Avenue sidewalk between 62nd and 65th Streets; (2) Respondent threatened the Union with arrest and caused the police to threaten the Union with arrest, for leafleting on the Columbus Avenue sidewalk on May 11th, and June 28, 2000; and (3) Respondent promulgated, maintained, and selectively and disparately enforced the anti-leafleting policy to discourage employees from joining and assisting the Union or engaging in other concerted activities.

Upon receipt of the complaint, Respondent wrote to the Director complaining that it had not been given prior notice of unfair labor practices occurring on June 28, and had been deprived of the opportunity during the administrative investigation to submit evidence in response to the allegations. Respondent also demanded that the allegation with regard to June 28, be withdrawn.

The Director declined to withdraw the allegation, but Respondent was advised that it could present any evidence that it wished concerning that allegation, and the Director would consider such evidence. Respondent declined to submit any evidence at that time.

B. The Columbus Avenue Sidewalk

Lincoln Center is a complex of buildings located on the upper westside of Manhattan. The complex includes various venues such as the Metropolitan Opera House, New York State Theater, and Vivian Beaumont, where different types of performances are regularly held. The complex is bordered by Columbus Avenue between 62nd and 65th Streets, and the sidewalk at issue here is located on the West side of the street. This sidewalk, like any other sidewalk, is one that pedestrians regularly use to walk up and down the street.

However, the sidewalk is also used by patrons coming into the complex to attend events. The patrons will use the sidewalk and enter the complex by walking up one of several access stairs which lead up to pedestrian walk, an access road, and then onto the Josie Robertson Plaza, (the Plaza), which is a large square in the middle of the complex.

New York City owns the entire Lincoln Center property, but the City and Respondent have entered into a license Agreement, which has been most recently amended in 1993 and which runs for a 10-year term ending on January 1, 2004.

The agreement provides that the City licenses Respondent, "on behalf of and as an agent of the City to manage and maintain the premises" Premises is defined in the Agreement as "the Garage and Public Areas." "Public Areas, is further defined to include the Plaza, and the "sidewalk, steps and access road paralleling Columbus Avenue, including access stairs to pedestrian walks."[2]

Respondent is also granted the right to "maintain revenue producing activities" and to "schedule events" in the public areas. "Event" is not defined in the agreement, but the City Parks Department appears to define an "event" as an activity consisting of 20 or more people, since its regulations require a permit for various gatherings of 20 or more people.

Section 8.1 of the agreement gives Respondent the authority to schedule events in the public areas, and the City agrees to forward to Respondent all applications it receives for use of the public areas. In connection with that authority, Respondent can charge reasonable fees, require bonds for anticipated costs of cleaning, security or other services, and obligates Respondent to "provide usual and normal maintenance, repair, security and clean up services . . . which take place in the public areas."

C. Local 100's Organizing Campaign

In March of 1999, the Union commenced a campaign to organize employees of Restaurant Associates (RA) employed in various food service capacities at the Metropolitan Opera House (the Met). None of the workers whom the Union is seeking to represent are employed by Respondent or the Met.

In connection with this organizing campaign, the Union engaged in various activities around the complex including leafleting, rallies, and a candlelight vigil. Dennis Diaz has been the Union's lead organizer, and has been in charge of the campaign at the complex.

Diaz testified without contradiction, that from March of 1999 through April of 2000, two or three times a week, generally from 6:30 p.m. to 8:40 p.m., he and other union representatives, distributed leaflets to individuals walking along the Columbus Avenue sidewalk as they were approaching the steps to enter the complex. During this period of time, there was no attempt by representatives of Respondent or the New York City Police to interfere with the leafleting.

During this same period of time, Diaz observed several other groups leafleting on the sidewalk, including supporters of the Musicians Union on Dec 1, 1999, and an Animal Rights Organization in February of 2000.

Respondent presented two witnesses concerning its past practice concerning permitting leafleting on the Columbus Avenue sidewalk. These witnesses, Andre Mirabelli, senior vice-president for operations and Vincent Talamo, associate director of security, contend that Respondent's policy had always been to prohibit any leafleting on the Columbus Avenue sidewalk, but both witnesses concede that Respondent had for many years "let the policy slide," and did not enforce it dili-

[2] It is notable that the agreement does not mention the sidewalks on Amsterdam Avenue, 62nd Street, or 65th Streets, which border the complex on the west, south and north sides. No explanation was given by any witness as to why only this "sidewalk" is considered a "Public Area". However, it does appear that this sidewalk leads to the main entrance to the complex, and parallels an access road between the stairs and the Plaza.

gently with either the police or the staff. Indeed it is clear that Respondent was more concerned with leafleting or demonstrations on the Plaza, where it regularly evicted those engaging in such conduct, and if necessary would request assistance from the police in helping to remove such individuals. Indeed according to Mirabelli, where there were demonstrations or picketing on the Plaza, Respondent would direct the picketers or demonstrators to the Columbus Avenue sidewalk to continue their activities.

However, according to Mirabelli sometime in late 1999, he began to notice that the level of leafleting on the Columbus Avenue sidewalk began to increase, and he asserts that activity became troublesome because the leafleters became "a lot more pushy, a lot more aggressive, they weren't politely offering a leaflet, now they were engaging in argumentative discussion and debate." Thus, Mirabelli contends that he instructed Talamo and the Director of Security, Gerry Katom, at that time to vigorously enforce Respondent's alleged policy to forbid leafleting on the Columbus Avenue sidewalk. This led to, according to Mirabelli and Talamo, the issuance of a memorandum to the staff, dated February 26, 2000. This memo reads as follows:

DATE: February 26, 2000

TO: Tour Commanders
Security Supervisors

FROM: Vince Talamo

SUBJECT: Leaflet Distribution on Columbus Avenue

Whenever leaflets are observed being distributed on the Columbus Avenue Sidewalk in front of the Robertson Plaza, the following Security Department Response is to initiated:

1. Immediately notify the Security Director, Associate Director or Assistant Director on duty.
2. If the distribution of leaflets occurs during a time when the director or his assistants are unavailable, the tour commander will:
   - Personally inform those distributing leaflets that Lincoln Center does not allow such behavior on Its campus.
   - If those distributing the leaflets persist, the NYC Police are to be summoned and requested to direct this activity away from the Columbus Avenue sidewalk.
   - A written report that describes the entire timeline of any such event, including the police response, will be forwarded to the Director of Security before the completion of the tour.
   - The identity of the group or persons actually Engaged in distributing leaflets will, if this can be accomplished without undue confrontation be ascertained by the tour commander. A sample of the leaflet should also be gathered and forwarded.
3. These instructions are in addition to standing orders concerning demonstrations and distributing leaflets on the Robertson Plaza.

Submitted for your compliance and information.

Both Talamo and Mirabelli furnished testimony concerning the specific incidents that motivated Respondent to issue the February 26 memo. Talamo listed a PETA [3] demonstration on the Plaza and Local 100's conduct in leafleting on the sidewalk. Indeed, according to Talamo, even prior to February 26, 2000, there were times when union representatives were leafleting on the Columbus Avenue sidewalk, and he would ask them to leave, in accordance with Respondent's policy. According to Talamo, the Local 100 representatives would refuse to leave contending that the sidewalk was a public place. Talamo contends that he then told the union representatives that he intended to consult with the police about the matter. He adds that he did request that the police take action to remove them or arrest them, but the police responded that it was "unprepared to take action." Therefore, the Local 100 leafleters continued to leaflet.

Mirabelli testified to three categories of activities that led him to decide to vigorously enforce alleged prior policy to forbid leafleting on the Columbus Avenue sidewalk. These incidents included activities by PETA, which consisted of PETA representatives following patrons from the top of the stairway to the Plaza, and at times spraying blood on patrons wearing fur coats. [4] Secondly, Mirabelli referred to Local 1990 representatives, who he observed would be aggressive in their conduct, by in addition to handing patrons a leaflet, discussing the matter with them. Mirabelli heard the union representatives talking to the patrons about "poor starving restaurant" workers not being able to exercise their rights to representation and that their families couldn't get medical care.

Finally, Mirabelli made reference to a demonstration by a different union, which included two enormous inflated rats. However, Mirabelli also conceded that the inflatable rats demonstrations took place not on the Columbus Avenue sidewalk, but on sidewalks on 65th Street near Alice Tully Hall and near Dante Park.[5]

Local 100's organizational activities at the complex resulted in a number of court actions regarding its rights to engage in such conduct. In the spring of 1999, the Union applied to the Parks Department for permission to hold a rally on the Plaza. The Parks Department referred the Union to Respondent, who denied the request. The Union consequently filed an action in Federal District Court, against Respondent and the City among others, seeking a temporary injunction seeking to enjoin these parties from preventing the rally. A hearing was held on the Union's motion before Judge Lawrence McKenna on June 4, 1999. In Respondent's response to the motion, it took the position that demonstrations or leafleting are not permitted on the

[3] PETA is an animal rights organization.

[4] Mirabelli conceded that the PETA representatives were not leafleting on the Columbus Avenue sidewalk.

[5] I note that these sidewalks are not included as public areas in the license agreement.

Plaza, but are allowed on the Columbus Avenue sidewalk. Affidavits submitted by two of Respondent's representatives so indicate, and in the Memorandum itself, Respondent argues as follows:

> There is nothing non-viewpoint neutral about a policy that reserves the Plaza for performance, entertainment, and artistic-related uses, and denies permission for other organized activities, such as political rallies electioneering, demonstrating against domestic or foreign figures who may be present, and the like —all of which are routinely excluded from the Plaza, and relegated to the *genuinely public areas adjacent to Lincoln Center, such as Dante Park, the sidewalks on Columbus*, 65th and 62nd Streets, and Amsterdam, and Damrosch Park. (emphasis added)

Moreover, during the argument on the injunction before Judge McKenna, the attorney representing the city stated that in the City's view, the Union is permitted to leaflet "on the citty [sic] streets", but not on the Plaza. When asked by the Judge if there is a different rule for labor speech, the attorney replied that the rules are the same for any kind of speech, and added that "City Streets allow for picketing of all sorts all the time." However, the City agreed with Respondent's contention that the Plaza is a "limited public forum," and can reasonably be limited to the purpose for which it was established, i.e., artistic performance.

Judge McKenna issued his decision on June 4, 1999, denying the Union's request for an injunction. He declined to reach one issue raised by Respondent that the Plaza was a nonpublic forum by reason of the City's license agreement. However, the Judge found consistent with the position of Respondent and the City, that the Plaza is a limited public forum *Lebron v. National Railroad Passenger Co.*, 69 F.3d 650 amended 89 F.3d 39 (2nd Cir. 1995), and that the exclusion of the Union from the Plaza is lawful since it is viewpoint neutral and reasonable in relation to the forum's purpose.

Subsequently, the action came before Judge Kevin Duffy, who upon consideration of motions for summary judgment, issued a Memorandum and Order on August 26, 2001, *Hotel Employees v. City of New York Parks Department*, 167 LRRM 2127 (2001). Judge Duffy, after reviewing applicable precedent, essentially agreed with Judge McKenna's conclusions. Judge Duffy observed, however, that in designated public forums, where the government has opened it for use by the public for expressive activity or traditional public forums, where by tradition it has been devoted to assembly and debate, content based regulations survive only "if reasonably drawn to achieve a compelling governmental interest." *General Media Communications v. Cohen*, 131 F.3d 273, 278 (2nd Cir. 1997). In a nonpublic forum or in a limited public forum, which is how Judge Duffy concluded the Plaza should be categorized, speech can be limited, if the limitation is reasonable, and not viewpoint based. Judge Duffy agreed with Judge McKenna that since the Plaza has been consistently limited to use for performance and artistic uses, that Lincoln Center's policy of prohibiting political activities on the Plaza is reasonable and not violative of the Union's First Amendment Rights.

Judge Duffy therefore granted the motion for Summary Judgment filed by the Defendant's, (Respondent and the City) and denied the Union's motion for Summary Judgment. He therefore dismissed the action.

In March of 2000, the Union submitted a request for a permit to the New York City; Parks Department to hold a candlelight vigil on the Columbus Avenue sidewalk on March 30. The permit was initially granted by the Parks Department, and the Union actually picked up the permit. However, on March 29, the Union received a message that the vigil could no longer be held on the Columbus Avenue sidewalk, but instead it should be moved to Dante Park.

On March 30, the Union nonetheless arrived at the sidewalk as originally approved, and began to setup for the vigil. However, Christine Hokenberg, of the Parks Department directed the Police to arrest the demonstrators. Two union officials were arrested, and the Union then decided to move across the street to Dante Park to hold the vigil. Respondent was not involved in this incident, and the Union had no contact with Respondent's representatives with respect to this matter.

In mid April, the Union filed an application with the Parks Department for a rally to be held on May 11th on the Columbus Avenue sidewalk. On April 25th, Hokenberg of the Parks Department wrote to the Union, asserting that the Parks Department cannot grant or deny the permit, since the sidewalk is not under the Parks jurisdiction. The application was subsequently forwarded to Respondent, who then denied the application.

On April 25, the same day that the Parks Department responded to the Union's permit request, the president of Respondent and assistant general manager of the Metropolitan Opera, wrote a letter to Mayor Guliani of New York City. The letter reads as follows:

> April 25, 2000
>
> The Honorable Rudolph W. Giuliani
> City Hall
> New York, NY 10007
>
> Dear Mr. Mayor:
>
> Lincoln Center, as you know, has been an area in which unions and Other groups have chosen to demonstrate from time to time. We have Recently been informed that on May 11th, when the Metropolitan Opera will be hosting its Pension Fund Gala with the Three Tenors, Local 100 of the Hotel Employees and Restaurant Employees Union plans to hold a demonstration as part of an ongoing effort by it to force recognition by Restaurant Associates without an election. Restaurant Associates is the company that provides food and beverage service at the Met. We are writing because it became apparent during the last demonstration Local 100 held several weeks ago on March 30th that the NYPD was unclear about whether to keep the sidewalk in front of the Lincoln Center complex free of demonstrators.
>
> The specific area of the Lincoln Center plaza to which we are referring is the sidewalk on the west side of Columbus Avenue between 62nd and 65th Streets, directly in front of the plaza's main stairway. While Lincoln Center on certain previous occasions has permitted small numbers of labor demon-

strators to leaflet on that sidewalk, it no longer will permit any demonstrating there. Over the last several years, as arts events at Lincoln Center have become more congested, demonstrations have become more troublesome. The sidewalk is only 14-1/2 fee across and the stairway is surrounded on either side by walls. The sidewalk and stairway, however, are the primary route of ingress and egress for the many thousands of patrons who, on any given evening, attend performances at the New York State Theater, Avery Fisher Hall, the Met, and other Lincoln Center sites. Demonstrators on that already overcrowded piece of real estate would unacceptably block the way. They would, as well, create a potential safety problem, given the continuous flow of taxis and other vehicles pulling up to that curb to drop off and pick up riders.

Lincoln Center intends to be vigorous in asserting and pursuing its rights to keep that area, as well as the rest of the plaza, free of demonstrators on May 11th and during any future deomonstrations.

Sincerely yours,

Nathan Leventhal, President Joseph Volpe, General Manager
Lincoln Center for the Performing Arts. Inc. Metropolitan Opera Association, Inc.

Sometime in April, the Union filed another lawsuit, against the City, Mayor Guliani, and various other defendants, but not Respondent, over the failure to grant it a permit to conduct a rally on the Columbus Avenue sidewalk. Although Respondent was not a party to the lawsuit, it was summoned by Judge Harold Baer to attend a settlement conference on the matter on

May 3rd. After extended discussions, an agreement was reached by the parties to settle the lawsuit. The agreement was signed by Respondent, the Union and consented to by the City. It was signed by Judge Baer on May 10th. The Order reads as follows:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 100,

Plaintiff 00 Civ. 2681 (HB)

-against- ORDER

CITY OF NEW YORK, et al,
Defendants,

Hon. Harold Baer, Jr., District Judge

WHEREAS a mediation conference was held in this matter on May 3, 2000, at which time the plaintiff reached an agreement with the Lincoln Center or the Performing Arts ("Lincoln Center"), a third party, to resolve this action (see Agreemet attached); and

WHEREAS this agreement was signed by plaintiff, Lincoln Center, and this Court on May 5, 2000; and WHEREAS the City of New York was present at the conference and consented to the terms of the agreement; and

WHEREAS the parties agred to be bound by the language of the Agreement and that the agreement would constitute the entire accord reached by and between the parties, specifically the plaintiff and all the defendants named in this action, the Lincoln Center, and the Metropolitan Opera, all of whom were present at the mediation; it is hereby

ORDERED that this action against the City of New York and the named defendants is dismissed with prejudice. The parties are bound by the terms set forth in the attached agreement.

SO ORDERED.

New York, New York
May 10, 2000

S. Harold Baer
U.S.D.J.

AGREEMENT

Local 100, Hotel Employees and Restaurant Employees International Union and Lincoln Center for the Performance Arts, Inc. agree as follows:

Lincoln Center contends that the entire campus bounded by Columbus Avenue, West 62nd Street, West 65th Street, and Amsterdam Avenue, is its property to administer under its agreement with the New York City Department of Parks. Nonetheless, in order to avoid litigation at this time, Lincoln Center will not enforce its alleged rights of ejection under the trepass laws on May 11, 2000, with respect to a planned rally by those acting in concert or participation with Local 100, so long as Local 100 comply with the following terms:

1. Local 100's rally within the area specified below will not commence before 4:15 p.m. and will conclude by 6:15 p.m.

2. If Local 100 and its supporters seek to rally on the west side of Columbus Avenue, they are limited to the sidewalk immediately west of Columbus Avenue in the areas (i) 8 feet or more northward of the most northerly steps running from Columbus Avenue toward Avery Fisher Hall, and (ii) 8 feet or more southward of the most southerly steps running from Columbus Avenue toward the New York State Theatre, and shall undertake their rally on no other portion of Lincoln Center property.

3. Local 100 and those acting in concert of participation with it will leave Lincoln Center's property promptly by 6:15 p.m.

4. No more than 75 people shall participate in the rally described above in on the western side of Columbus Avenue.

5. The times of the Metropolitan Gala will remain as set out in the invitation annexed to the Order to Show Cause filed by this plaintiff in Metropolitan Opera v. Local 100 Hotel Employees and Restaurant Employees Int'l. Union, Index No. 105859/00.

6. This agreement has no precedential effect, and shall not be cited by either side as having any precedential effect.

May 3, 2000

AGREED:

Charles S. Sims
Attorney for Lincoln Center for the Performing Arts, Inc.

Joseph Lynett
Attorney for Local 100

USDJ

D. May 11 and its Aftermath

On May 11, the Union conducted a rally beginning at 4:15 p.m. on the Columbus Avenue sidewalk. The rally consisted of 75 individuals chanting and waving flags. During the rally, Diaz and three other union representatives also handed out leaflets to passerbys. Prior to the start of the rally, union officials including its attorney has a discussion about what was to happen at 6:15 p.m., (the end of the rally on the sidewalk as per the court order). They decided that at 6:15 p.m., the 75 people would go across the street to Dante Park to continue the rally. However, it was concluded that union representatives would remain on the sidewalk and continue to distribute leaflets. They discussed the court order that referred to Local 100 and those acting in concert will leave Lincoln Center's Property by 6:15 p.m. and concluded that the "understanding" was that the group of 75 people who were "rallying" would have to leave the sidewalk, but that leafleting could continue.

Therefore, at 6:15 p.m., the group of 75 went across the street to Dante Park to continue the rally. Diaz however, continued to distribute leaflets at the North stairway, after 6:15 p.m., as did one other union representative on the New York State side of the sidewalk.

At approximately 6:30 p.m., Diaz observed Evelyn Finkelstein, Respondent's General Counsel, standing three feet away from him and talking on a cell phone. He overheard Finkelstein say, "I want Mr. Diaz arrested for leafleting." After a pause, Finkelstein stated "because he's leafleting." Diaz said nothing to Finkelstein, and Finkelstein said nothing to him. Three or 4 minutes later Diaz was approached by two New York City policemen. One of the officers informed Diaz that if he continued to leaflet he would be arrested for criminal trespassing and for violation of a court order. Diaz responded that the Union has always leafleted in the past and it was a public sidewalk. At that point, Joe Lymett, the Union's attorney entered the conversation. Lynett asked the police officers, who is directing the police to arrest the union representatives. The police officer did not respond. Lynett then informed the police that if anyone was arrested the Union's position was that it would be under the direction of Lincoln Center. He also mentioned the Union's Position on the court order. He said, "look this is the rally" referring to the 75 people across the street, and "these are the leafleters," pointing to Diaz and the other leafleters. The police officer said to Lynett, "I'm going to check with legal."

The two police officers then walked away and conferred with a group of other police officials. Diaz continued to leaflet until 7:00p.m. and then left. The police officers did not bother Diaz again.

At some point between 6:30 p.m. and 7 p.m., Talamo approached Diaz. Talamo informed Diaz that he was violating the agreement by leafleting on the sidewalk, and that he (Talamo) would consult the police about it if he didn't leave. Diaz replied, "the hell with the agreement," and continued to leaflet. Talamo then spoke to a policeman and asked the police to remove Diaz. The police officer responded that he was not prepared to take any action to remove the leafleters. Talamo was not given any reason why the police declined to do anything in response to his request.

During the period that Diaz was leafleting on May 11, from 6:16 p.m. to 7 p.m., two African American women were passing out flyers for the Concert Theatre Club. One was standing 3 or 4 feet away from Diaz and the other on the New York State side of the sidewalk. These two women were not approached by anyone from Respondent nor the police department. However, Diaz could not be certain that any of Respondent's officials either saw these two women or knew who they were. Diaz did testify however, that he observed Respondent's security officials and the police on top of the Plaza looking towards the sidewalk where the women were leafleting. Diaz did not confront either the police or representatives of Respondent with the fact that these two women were permitted to leaflet, while he was being asked to leave and threatened with arrest if he did not comply.

On September 12, 2000, Sharon Grubin, General Counsel for the Metropolitan Opera, wrote a letter to Daniel Connolly, Special Counsel to the Corporation Counsel of New York City. The letter makes several complaints about the conduct of the New York City Police Department in general and a Lt. Albano in particular. The letter asserts that the police failed to "furnish adequate protection from Local 100's misconduct on at least three occasions." These occasions included May 11, wherein Grubin's letter asserts that "you probably recall that on May 11, both Evelyn Finkelstein and I were required to call you from the midst of the demonstration because Lt. Albano was not enforcing the law (not to mention the consent order reached with Judge Baer." The letter made reference to the fact that the police did ask Diaz to leave, but that he would not go, but that the police refused to arrest Diaz.

The letter further mentions an upcoming event September 25, the Met's opening night, and demands that the police enforce the law in the event of another demonstration by Local 100.

Connolly responded by letter dated September 21. He defended the actions of the police on May 11, as having acted in "direct consultation with me and with Corporation Counsel, Michael D. Hess, in a fashion that allowed Union to conduct their demonstration without causing any interference to activities held at Lincoln Center that evening." Connolly concludes the letter by assuring Grubin that the New York Police Department will carry out their duties properly on September 25, and that if anyone violates the law, the New York City Police Department will take action. However, as we have repeatedly discussed, a individual participating in constitutionally protected activities on a sidewalk open to the public (regardless of where the proprietary interest of such sidewalk lies) in a *nonobstructive or harassing* manner is not violating the law.

Grubin responded to Connolly by letter and fax on September 22. After responding to several contentions made by Connolly, Grubin makes reference to the penultimate sentence in his letter. She asserts that what is obstructive and harassing" have already been defined at least in part by, Judge Preska. Ms. Grubin adds that there is "currently a federal injunction in place preventing, *inter alia*; trespass and blocking of ingrress to and egress from the very property to which you refer, that you seem to think need not be enforced."

The record does not reflect what federal injuction Ms. Grubin was referring to. However, from the correspondence between Grubin and Connolly, it appears that the Metropolitan Opera filed an action under the Norris LaGuardia Act, accusing the New York City Police Department of failing to protect Lincoln Center's property. It appears that Judge Preska, after a hearing found that the New York City Police Department, had in fact, failed to furnish adequate protection, and his appears to be the injunction referred to in Grubin's letter. However, the record here does not reflect what evidence was presented at the hearing before Judge Preska to establish that either the New York City Police Department failed to furnish adequate protection on May 11, or that as Grubin seemingly suggests that the Union had "blocked ingress to egress from the very property to which you refer" on May 11. In any event, it is clear that no such evidence was adduced on this record, that Diaz or any union representative blocked egress or ingress to the property on May 11, or any other day.

Between May 11 and June 28, Diaz continued to leaflet once or twice a week on the Columbus sidewalk, between 6:30 p.m. and 8:30 p.m. There was no interference of the leafleting by either Respondent or the New York City Police Department.

However, on June 26 at 7 p.m. five Local 11 organizers were observed by Respondent's security officials distributing leaflets at the Damrosch New York Pops Concert and on the sidewalk along Columbus Avenue and the Inner Roadway. Dan Fletcher, a Security official of Respondent, in the presence of New York City Police Department officers, informed the leafleters that they were in violation of a Federal court order, and they departed without further incident. [6]

E. June 28

Michelle Travis, a research analyst for the Union, went to the Columbus Avenue sidewalk on June 28, and at about 5:45 p.m. along with an intern from the Union and began to distribute "Ralph Nader for President" leaflets. She did this because of the incidents on May 11, as well as June 26, described above where Local 100 representatives were either prevented from leafleting by Respondent's officials, and or threatened with arrest. Thus, the Union wanted to see if other organizations were being treated differently than Local 100 leafleters.

After about a half hour, Travis and the intern were approached by Talamo and Kennedy. Talamo told Travis that they could not leaflet on the sidewalk, that Respondent had been having a problem with a Union, that there was a court order; and they would have to leave. Travis responded by asking "about everybody else," referring to other leafleters from Club Free Time who were leafleting at the time, and a United Homeless Organization that had set up a table. Travis asked if these groups had to leave as well? Talamo responded that they were going to go over there and tell them to leave as well.

Talamo added that if they wanted to continue to leaflet, they could go across the street to Dante Park. If not, they could be arrested.

Travis then asked what does a Union have to do with us? Talamo replied, "that the Union is watching us very closely. We have to be consistent." Talamo again mentioned a court order, and added that was why everyone has to leave the sidewalk, and no longer leaflet there. Talamo concluded by telling Tavis, "if you go across the street and leaflet, if everything is okay, maybe in 15 minutes you can come back and leaflet." Travis and the intern complied with Talamo's order, and went across the street. She noticed that Talamo and Kennedy went over to speak to the Club Free Time leafleters, and said something to them, and they immediately went across the street to Dante Park to continue their leafleting. Travis did not see Kennedy or Talamo speak to the United Homeless Organization group, but fifteen minutes later, she noticed that this group was gone from the sidewalk. Travis did not attempt to resume leafleting on the sidewalk in 15 minutes, as Talamo had suggested.

Also on June 28, Diaz decided to leaflet on the Columbus Avenue sidewalk. However, with the events of May 11, and June 26, in mind, he called the New York Park Department to advise them that the Union would be leafleting later that evening. Diaz was then informed by a New York Police Department officer that if he leafleted, "you guys will be arrested."

Nonetheless, at 6:30 p.m., Diaz, plus three other union representatives, arrived at the Columbus Avenue sidewalk. They began to leaflet, and Talamo immediately approached them. Talamo said that Diaz and the other organizers could not leaflet, because they would be in violation of a court order. Talamo added that they would be arrested if they did not leave. Diaz asked to see the court order, but Talamo refused to show him one. Talamo then walked up to the Plaza, and spoke to a police office. Two or 3 minutes later, Diaz was approached by that police officer. The officer told Diaz and the others that if they didn't leave they will be arrested for criminal trespassing and violation of a court order. Diaz asked who the complainant would be if they were arrested? The police officer then walked up the stairs to where Talamo was, spoke to Talamo, and returned to Diaz. He handed Diaz, Talamo's card, and stated that Talamo would be the complainant. Diaz and the other union representatives then left.

F. July 1

On July 1, Diaz went to the vicinity of the Columbus Avenue sidewalk at 6:30 p.m. He sat on a bench in Dante Park, and observed various individuals from several organizations leafleting on the sidewalk until 9 p.m. He would cross the street, collect the leaflets, note the time on the leaflet and return to his bench. In that connection he collected four leaflets, including one from "Concert Club", one from Jews for Jesus, one from

[6] The above finding is based on a memo from Respondent's file from Vincent Kennedy, Director of Security to Mirabelli. The record does not disclose if Diaz was one of the union organizers involved in this incident.

Club Free Time, and one from The Manhattan Ballroom Society.

At about 8 p.m., Diaz approached Police Office Kennedy, who is one of officers regularly stationed at Lincoln Center. Diaz informed Kennedy that he had seen different people from different organizations leafleting, and asked why Kennedy had not told them to leave, or threatened them with arrest. Kennedy replied, "it's up to Lincoln Center." Diaz answered that he understood, and returned to his bench across the street.

Approximately 15–20 minutes later, Diaz saw Daniel Fletcher, Respondent's Associate Director of Security approach Officer Kennedy. At that time there were two African American women distributing leaflets, and one male distributing a Jews for Jesus leaflet on the Columbus Avenue sidewalk. Fletcher and Kennedy had a conversation, but Diaz could not hear what was said. However, Diaz testified that Fletcher was looking in the direction of the leafleters while he was talking to Kennedy. After the conversation, Fletcher turned around and walked away. Neither Kennedy nor Fletcher made any attempt to remove the leafleters, who continued to leaflet until 9 p.m.

G. July 6

On July 6, Diaz and other union representatives began to leaflet on the Columbus Avenue sidewalk. Fletcher approached the officials, and said that they cannot leaflet there and they would be arrested for criminal trespassing, and violation of a court order. Diaz asked to see the court order, but Fletcher refused to show it to him. Fletcher then called over a New York Police Department Officer. The officer asked what was going on? Diaz replied, that the Union was leafleting which they have a right to do, and that Fletcher had said that the Union could not leaflet and would be guilty of criminal trespass in violation of a court order if they continue. The officer instructed Fletcher to produce the court order. Fletcher then went inside the Metropolitan Opera House. A few minutes later Diaz observed Fletcher speaking to the police officer on the Plaza; and showing him a document. The police officer then walked down to the sidewalk and informed Diaz that the Union can leaflet on the sidewalk, there is no court order prohibiting leafleting the sidewalk and the court order that he saw pertains to the Plaza.

Diaz and the other union representatives continued to leaflet that day, and have continued go leaflet on the sidewalk without interference on a regular basis, since July 6. [7]

As related above, in September, correspondence between Grubin and Connolly (copies of which were sent to Finkelstein), detailed dissatisfaction of the Metropolitan and Respondent with the New York Police Department's failure to arrest Local 100 demonstrators on May 11, as well as other dates. Both Mirabelli and Talamo furnished testimony on this subject.

According to Talamo, both before and after February 26, when he would see leafleters on the Columbus Avenue sidewalk or his staff would ask them to leave. If the leafleters refused to leave, he would consult with the police, and tell them that Respondent has control over the sidewalk based on its agreement with the Parks Department and Respondent wanted them removed. The New York Police Department would tell Talamo that they "were unprepared to take any action." Talamo testified that he was aware that his supervisors had made complaints to the Local commanding officer of the precinct about the New York Police Department's failure to comply with Respondent's request to remove and or arrest the leafleters. Talamo asserts that he was informed that the commanding officer had checked with the New York Police Department's legal department, and that based on legal advice, were not willing to arrest anyone for leafletting on the Columbus Avenue sidewalk.

Mirabelli testified that the main purpose of the April 25 letter to Mayor Guliani, was that the New York Police Department was not enforcing Respondent's rights of control over the sidewalk, and Respondent wanted the city to be clear about its position.

According to Mirabelli, when Respondent would ask the police for help in removing leafleters from the sidewalk they would assist in asking them to move, but not necessarily arrest them. Mirabelli recalled one specific occasion when he observed Local 100 leafleting on the sidewalk, and he asked a policeman what he was going to do about it. The officer replied that he would have to check with someone. Mirabelli was then informed that the police had checked with their counsel and the New York Police Department was not going to remove or arrest the leafleters. Mirabelli also discussed the meeting that was held prior to the April 25 letter, with various representatives of Respondent and the constituent groups of Lincoln Center including Grubin. He reiterated that the letter was to get the focus of the mayor to deal with the New York Police Department to get them to enforce Respondent's rights to the sidewalk. [8]

Mirabelli conceded that in the course of that meeting, it was expressed that notwithstanding the existence of the license agreement, the New York Police Department felt that Respondent did not have the right to remove leafleters from the sidewalk, and that that New York Police Department would not remove or arrest such individuals. Mirabelli added that he was informed that the New York Police Department felt that they (the New York Police Department) did not have the authority to remove or arrest people leafleting on the sidewalk.

[7] My findings detailed above concerning the events of May 11th, June 28th, July 1st, and July 6th is based on a compilation of the credited testimony of Diaz, Travis and Talamo, as well a video tape of the May 11th incident. Neither Fletcher nor Finkelstein testified herein. To the extent that the record reveals some conflicts between the testimony of Diaz and Travis on the one hand and Talamo on the other, I have generally credited Travis or Diaz, since I found them to be more believable witnesses. However, I have credited Talamo's testimony concerning his exchange with Diaz on May 11th, although Diaz did not recall any discussion with Talamo on that date. I note that Diaz did not deny Talamo's testimony in this regard, and did not deny saying "the hell with the court order", as testified to by Talamo.

[8] Respondent received no reply to the April 25th letter.

III. ANALYSIS AND CONCLUISIONS

A. The 10(b) Issue

Respondent contends that Section 10(b) of the Act precludes consideration of the complaint allegation that Respondent violated the Act on June 28. In that regard, it contends that the original charge, filed on May 9, alleges that Respondent violated Section 8(a)(1) of the Act by threatening to file criminal trespass charges against Local 100 for engaging in protected conduct on city sidewalks outside Lincoln Center.

Respondent also asserts that it was not during the investigation of the charge, put on notice of the June 28 allegation, and was not so notified until the complaint was issued on March 30, 2001, nearly a year later, which alleged violations both on May 11 and June 28.

Respondent further argues that in view of the above facts, and the failure of the Union to file new or amended charges, that Respondent was prejudiced by its inability to respond to the June 28 allegation, and that it was denied procedural due process.

I do not agree.

Initially, I note that there is no significant variance between the charge and the complaint. All complaint allegations relate to events that occurred within 6 months of May 3, as both May 11 and June 28, and well within 6 months of the charge.

With respect to Respondent's complaint that it was not notified of the June 28 allegation during the investigation, I note that Respondent was given the opportunity to present evidence to the Region on the issue, after it became aware of the allegation, but chose not to do so. More importantly, "it is not the function the charge to give notice to a respondent of the specific claims made against him. Rather that is the function of the complaint." *Redd-I, Inc*., 290 NLRB 1115, 1116–1117 (1988). Here, Respondent had ample opportunity to defend against the allegation of unlawful conduct on June 28, since the complaint so alleged, and that is all that is required to establish procedural due process. *Redd-I* supra at 1117.

Moreover, even if I were to consider the complaint allegation relating to June 28 as outside the 10(b) period, such allegations are permitted if they are closely related to the allegations of the timely filed charge. *Redd-I* supra; *Nickles Bakery of Indiana*, 296 NLRB 927, 928 (1989). In assessing the issue of whether complaint allegations are closely related to the charge, the Board considers the following factors:

> First, the Board will look at whether the otherwise untimely allegations involve the same legal theory as the allegations in the pending timely charge. Second, the Board will look at whether the otherwise untimely allegations arise from the same factual circumstances or sequence of events as the pending timely charge. Finally, the Board may look at whether a respondent would raise similar defenses to both allegations. *Nickels Bakery* supra at 928.

Here, all three of the factors related above are clearly met. The complaint allegations involve same illegal theory as in the charge. The charge alleges threats to file criminal trespass charges against Local 100 agents for protected activities on city sidewalks. The complaint allegations in question, allege threats to arrest, causing the police to threaten to arrest union representatives handing out leaflets; and rely on the same section of the Act, as well as the same legal theory; i.e. Respondent did not have a sufficient property interest in the sidewalk to ban leafleters and to threaten leafleters with arrest.

Secondly, the complaint allegations arise from the same factual circumstances or sequence of events as the pending charges. Thus the allegations on May 11 and June 28 involve similar conduct, during the same time period, and with a similar object. *Redd-I* supra at 1118.

The Respondent argues that this factor is not satisfied, because the June 28 allegation does not arise from the same factual circumstances and sequence of events as the charge filed 2 months earlier, citing *Nickles Bakery* supra at 928. However, Respondent's reliance *on Nickels Bakery* is misplaced. That case merely held that the "by these and other acts" language in the charge, is not in itself sufficient to meet the closely related test, required by *Redd-I*. The fact that June 28 is 2 months after the date of the charge is of no consequence. What is of consequence, as related above, is that June 28 alleged conduct is similar to the conduct alleged in the charge, is during the same time period, and is with a similar objective to prevent union organizers from engaging in protected activities.

Finally, the Board looks to whether Respondent would raise the same or similar defenses to both allegations. Here it is clear that Respondent would and in fact has raised similar defenses to its conduct on both May 11 and June 28. Thus, Respondent's primary defense to its conduct, and in fact, the key issue to be determined herein is whether Respondent by virtue of its license agreement with the city, has a sufficient property interest in the Columbus Avenue sidewalk, to enable it to evict or threaten to arrest leafleters from Local 100 for leafleting on that sidewalk. Respondent has raised that defense with respect to both its conduct on May 11 and June 28.

Accordingly, based on the foregoing, I reject Respondent's 10(b) defense, dismiss its affirmative defenses in that regard, and shall proceed to evaluate all allegations of the complaint.

B. Employee Status

Respondent asserts that no violation of Section 8(a)(1) of the Act can be found, since none of its employees were implicated in any way by the alleged unfair labor practice. In that regard, Respondent notes that the underlying dispute between RA and the Union did not involve any of Respondent's employees. Therefore, it asserts that it cannot be found to have violated the Act, since it could not "threaten coerce or restrain employees whom it does not employ, in the exercise of rights [sic] guaranteed under Section 7 of the Act."

I disagree.

Board law, supported by the courts is clear acts of unions and their agents can be protected under the Act. Employees of employers other than Respondent have Section 7 rights, and even if these interests are not congruent with or even antithetical to the interests of the Respondent's employees their concerted pursuant of those interests, through Unions, or otherwise, is protected by Section 7 of the Act. *BE & K Construction Co*., 329 NLRB 717, 724–725 (1999), enfd. 246 F.3d 619, 626 (6th Cir. 2001); *Petrochem Insulation*, 330 NLRB 47, 49 (1999);

enfd. 240 F.3d 26, 29–30 (D.C. Cir. 2001); *Golden Stevedoring Co.*, 335 NLRB 410, 413 (2001), *Bristol Farms*, 311 NLRB 437, 438 fn. 8 (1993).

Accordingly, whether or not Respondent's employees are involved in the dispute between RA and Local 100 is irrelevant to the question of whether or not Local 100's conduct in distributing leaflets on the Columbus Avenue sidewalk is protected concerted activity. I find that such activity is clearly protected.

C. Respondent's Alleged Promulgation of And Disparate Enforcement of A Policy of Excluding Leafleters On The Columbus Avenue Sidewalk

The primary issue to be decided herein, as discussed more fully below, is whether Respondent had a sufficient property interest in the Columbus Avenue sidewalk to evict or exclude union leafleters. However, General Counsel also has alleged an alternative theory for a violation, that is viable even if Respondent demonstrated that it had an adequate property interest in the Columbus Avenue sidewalk.

Thus, General Counsel contends and the complaint alleges that Respondent on April 25, promulgated a policy not to permit demonstrators or leafleters on the sidewalk, and thereafter, maintained and disparately enforced this policy to discourage employees from joining or assisting the Union or engaging in other concerted activities.

Respondent denies that its actions on April 25, represented a change of policy, but asserts that it was merely a reaffirmation of its previous position that it would not permit demonstrations or leafleters on the sidewalk. Further, it contends that General Counsel has not presented sufficient evidence to establish disparate application of its policy.

While Respondent's witnesses contend that its policy was to prohibit leafleting on the sidewalk, the evidence of record is to the contrary. Thus, Diaz's credible testimony establishes that starting in March of 1999, for over a year, he and other Local 100 representatives regularly leafleted on the sidewalk without any interference from Respondent's officials. Moreover, he observed other groups leafleting during this period of time, also without any effort by Respondent to stop such conduct.

Moreover, Respondent's letter to Mayor Guliano, dated April 25, in effect concedes that it instituted a new policy, by stating that while, in the past has permitted "small" numbers of labor demonstrators to leaflet on the sidewalk, it will no longer permit any demonstrating there." Further, during the Union's lawsuit in 1999 with respect to holding a rally on the Plaza, both Respondent and the city took the position, that while demonstrations were not permitted on the Plaza, that the Union could and should confine its activities to public areas, including the Columbus Avenue sidewalk.

Indeed, even a close examination of the testimony of Respondent's witnesses, concedes that although Respondent may have always had a policy of prohibiting leafleting on the sidewalk, that in practice it had not diligently enforced that policy, but instead was more concerned with preventing such activity on the Plaza. Thus, even crediting that testimony, it is clear that in early 2000, Respondent changed its policy from lax and sporadic enforcement of a policy to more vigorous enforcement. This action represents a change of policy, which is equally unlawful, as if it was a new policy, assuming that it was motivated by protected conduct. *Jordan Marsh Stores*, 317 NLRB 460, 462 (1995). (Promulgation and enforcement of a previously ignored rule in response to Union activities); *Automotive Plastic Technologies*, 313 NLRB 462 (1993) (Prohibition of handbilling based on a rule never communicated to employees, found to promulgated in response to employees union handbilling); *Hyatt Regency Memphis*, 296 NLRB 259, 260–262 (1989). (More stringent enforcement of, sign-in, sign out rules in response to Union activities of employees.)

While Respondent claims that on February 26, it issued a memo to its staff, merely reaffirming its previous policy, a close examination of that memo does not support that testimony. Thus, the memo makes no mention that it is a reaffirmation of an existing policy, and the import of it is clearly that it is a new policy. I note particularly that the last sentence indicates "these instructions are in addition to standing orders concerning demonstrations and distributing leaflets on Robertson Plaza." This statement strongly indicates that previous to this date there had been no "standing orders" concerning distribution of leaflets on the sidewalk, but only on the Plaza, and that the memo was for the purpose of establishing a policy for the sidewalk.

However, as noted whether it is considered a new policy instituted by Respondent, or merely a reaffirmation of a policy that had not regularly enforced, makes no difference in assessing the lawfulness of Respondent's conduct. The issue is the motivation for Respondent's new policy or change of enforcement of an old policy. It is to that issue that I now turn.

In my view, the evidence overwhelmingly supports General Counsel's assertion, that Respondent's decision was, motivated by Local 100's protected conduct. Indeed, Respondent's letter to Mayor Guliani makes specific reference to the Union's dispute with RA and its intent to demonstrate on May 11 on the Columbus Avenue sidewalk. Moreover, the testimony of Respondent's own witnesses confirms this conclusion.

Thus, Mirabelli and Talamo both admit that one of the reasons that Respondent decided to issue the February memo was that Local 100's leafleting on Columbus Avenue began to increase. Mirabelli added that such activity became troublesome to him, because the leafleters became "a lot more pushy, a lot more aggressive, they weren't politely offering a leaflet, now they were engaging in argumentative discussion and debate." When asked for examples of such conduct, Mirabelli recalled hearing union representatives talking to the patrons about "poor starving restaurant workers," not being able to exercise their rights to get representation and that their families could not get medical care. While Mirabelli or indeed Lincoln Center's patrons, might consider such conduct "pushy and aggressive" such conduct is still protected concerted activity. It thus appears that while Respondent initially tolerated the Union's distribution of leaflets for nearly a year, that it decided to prohibit such activity, when the leafleting increased and when it was accompanied by oral conversations with patrons by the leafleters. Since all of this conduct by the leafleters is clearly protected concerted activity, Respondent cannot lawfully prohibit the leafleting because it believes that its patrons might not wish to be subject to such activity.

Further evidence supporting the conclusion of discriminatory motivation can be found in Respondent's conduct on June 28. Thus on that day, Travis was distributing Ralph Nader leaflet on the Columbus Avenue sidewalk, and was ordered to leave by Talamo. Talamo informed her that Respondent had been having a problem with a Union and she would have to leave. When Travis asked what a Union has to do with their leafleting on behalf of Ralph Nader, Talamo replied that, the "Union is watching us very closely. We, have to be consistent." This exchange demonstrates that Respondent's concerns about leafleting was centered on Local 100, and that it only ordered what it believed to be Ralph Nader leafleters to leave, in order to be consistent with its policy towards the Union. Indeed, later on that evening, Respondent did order Diaz to cease leafleting on the sidewalk.

An examination of the other alleged reasons given by Respondent's witnesses, for its policy change, only serves to reinforce this conclusion, that it was in response to protected conduct. Thus both Mirabelli and Talamo made reference to demonstrations by PETA as another reason for its decision to vigorously enforce its prior alleged rules. However, it is clear from their testimony, that while the PETA demonstrations involved conduct amounting to an assault on patrons, this activity took place on the Plaza or on the steps at the top of the stairway, and not on the sidewalk. Thus since it is clear that Respondent had consistently prohibited any leafleting or demonstrations on the Plaza, the PETA conduct could not have had any bearing on Respondent's decision to change its policy with regard to the sidewalk. Similarly, Mirabelli, testified that he also considered demonstrations by another Union with inflatable rats that occurred 3 or 4 years before on 65th Street near Alice Tully Hall. That testimony is simply not believable, since it is not likely that demonstrations 3 or 4 years ago on 65th Street would have any bearing on a decision to exclude leafleters on the Columbus Avenue sidewalk. In any event, that conduct (the demonstration by the other Union) is also protected and concerted, and couldn't lawfully be considered by Respondent in its decision to change its policy.

While Respondent's witnesses, as well as the April 25 letter to the Mayor raised alleged safety and overcrowding concerns, I do not believe that this was a major factor in its decision. I note that the distribution of leaflets by two to four leafleters cannot rationally be construed as having significant effect on ingress or egress for patrons. In any event, even if safety or overcrowding concerns, were part of the reason for Respondent's decision to change its policy, it has not shown that it would have taken the same action, absent the Union's protected concerted conduct. *Wright Line*, 251 NLRB 1083 (1980). Indeed, there is not an scintilla of evidence that during the Union's leafleting on May 11 or June 28, that anyone's egress or ingress was blocked by any of the leafleters, or that any safety problems resulted from the leafleting.

Accordingly, based on the foregoing, I conclude that Respondent's change of policy, by deciding to ban all leafleting on the Columbus Avenue sidewalk, was motivated by the protected concerted conduct of Local 100 representatives, and that Respondent has thereby violated Section 8(a)(1) of the Act. *Jordan Marsh* supra; *Hyatt Regency* supra; *Automotive Plastics* supra, See also *Youville Health Care Center*, 326 NLRB 495 (1998) (employer precipitously adopted a new rule regarding discussion of working conditions, in order to interfere with Section 7 rights); *Mini-Togs, Inc*., 304 NLRB 649, 651 (1991). (Employer promulgated Rule prohibiting non-employees, from handing out union literature in its parking lot, in response to union activity.)

Furthermore, while an employer may prohibit nonemployee union representatives from distributing union literature on its property (subject to exceptions not relevant here), it may not allow nonunion organization organizations to engage in solicitation and distribution on the employer's property, while denying the same privilege to Unions. *NLRB v. Babcock & Wilcox*, 351 U.S., 105 (1956); *Price Chopper*, 325 NLRB 186 (1997), enf. 163 F.3d 177 (10th Cir. 1998); *Sandusky Mall Co*., 329 NLRB 618, 620–621; *Be-Lo Stores*, 318 NLRB 1 (1995), enf. denied in relevant part 126 F.3d 268 (4th Cir. 1997), *Lucille Salter Packard Children's Hospital*, 318 NLRB 433 (1995), enfd. 97 F.3d 583 (D.C. Cir. 1996).

I agree with General Counsel that it has adduced sufficient evidence of disparate treatment to fall within the above cited cases, and that contrary to Respondent's assertion, the frequency of permitted nonunion activities, exceeds the "tolerance of isolated beneficient solicitation," that the Board regards as a narrow exceptions to, on otherwise valid, nondiscriminatory policy—*Sandusky Mall* supra; *Hammary Mfg*., 265 NLRB 57 fn. 4 1982).

In that connection, I preliminarily note my finding above that Respondent discriminatorily promulgated its change of policy to totally exclude leafleting on the Columbus sidewalk. This, finding is significant in assessing the issue of disparate treatment. *Price Chopper* supra, (Board finds that where employer applied in unwritten policy, hastily implemented in the face of Union's organizing, and excluded the Union from its property, under different circumstances in which no others outside organization has been excluded, a discriminatory motive lies behind the exclusion).

Here the evidence discloses that on May 11, at the very same time that Respondent attempted to evict union representatives through the conduct of Finkelstein [9] and Talamo, there were two African American women distributing concert club leaflets. While Diaz could not be certain that any of Respondent's representatives observed these individuals, he did testify credibly that he observed Respondent's security officials looking towards the sidewalk where these women were leafleting. I find it reasonable to conclude, which I do, that in fact, Respondent's did observe these women and made no effort to evict them.

I note in this regard that Finkelstein did not testify and although Talamo did testify about the events of May 11, he did not testify as to whether or not he observed these leafleters for the concert club, or any other groups leafleting on May 11. In these circumstances it is appropriate to me to draw an adverse inference against Respondent, and conclude that had Finkelstein or Talamo testified that they would have testified that they observed these women leafleting on May 11, and took no action

[9] My findings with respect to Finkelstein's conduct are more fully detailed below.

to have them removed. *National Association of Government Employees, (*IBPO), 327 NLRB 676, 699 (1999), *United Parcel Co.*, 321 NLRB 300 fn 1 (1996); *Ready Mix Concrete*, 317 NLRB 1140, 1143 fn. 16, 19 (1995), *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

Similarly, on July 1, Diaz although not leafleting on that day, observed the Columbia Avenue sidewalk for 2 ½ hours. During that period of time he observed leafleters from four different groups leafleting for substantial periods, without any interference from any representatives of Respondent or the New York Police Department. In fact, during this period of time, Diaz complained to Police Officer Kennedy why these groups were not being asked to leave or threatened with arrest (as had Local representatives). Kennedy replied, "It's up to Lincoln Center."

A few minutes later, Diaz observed Kennedy talking with Dan Fletcher, Respondent's Associate Director of Security. While Diaz did not hear the conversation, he did observe Fletcher looking toward the direction of the leafleters during the conversation. After the discussion, Fletcher turned around and walked away. Neither Kennedy nor Fletcher made any attempt to remove the leafters. I find based on these facts, that Fletcher observed the leafleters from these other groups, was aware of that they were not from Local 100, and chose not to attempt to remove them. Once more I note that Fletcher was not called to testify, and I again draw an adverse interference, based on the authority cited above, that if called to testify, he would have testify as detailed above.

Respondent argues that the events of June 28 established that Respondent treated all groups equally. However, I cannot agree. While the evidence does disclose that on that date, Talamo evicted Travis, who was distributing Ralph Nader leaflets, as well as other groups on that day, his conversation with Travis while asking her to leave is quite revealing of discriminatory motivation. Thus, Talamo informed Travis that Respondent was having trouble with a Union and she would have to leave. When Travis (who did not identify herself as a Union official) asked what the Union had to do with her leafleting for Ralph Nader, Talamo replied "the Union is watching us closely. We have to be consistent." Talamo then suggested that she go across the street and leaflet, and if "everything is okay, maybe you can come back and leaflet."

This exchange forcefully demonstrates that Respondent's policy was solely motivated by its desire to remove Local 100 leafleters, and that it had little concern with leafleters from other groups. Indeed on that very day, June 28, Talamo threatened to arrest Diaz and other union representatives when they began leafleting and enlisted the assistance of the New York Police Department to remove them from the sidewalk.

Respondent also argues that no discriminatory disparate treatment can be found, since admittedly for almost the entire period that Local 100 leafleted from April of 1999 and continuing to the date of the hearing, union representatives were permitted to leaflet on the Columbus Avenue sidewalk without interference.

However, while that may be true, based on the testimony of Respondent's own witnesses, its policy at least as of February 26, was to vigorously exclude any leafleters from the sidewalk. In practice, it did attempt to evict Local 100 representing on May 11, and did so on June 28. The record also reveals that on June 26, Fletcher, in the presence of New York Police Department officers, ordered Local 100 representatives to cease leafleting on the Columbus Avenue sidewalk. On July 6, Fletcher informed Diaz, who was leafleting on the sidewalk, that he could not leaflet there, and would be arrested if he continued. While the complaint does not allege that Respondent violated the Act on these dates, and therefore I do not so find, I can and do consider these events as relevant to the disparate treatment allegations. Thus, the record discloses that over a period of less than 2 months, Respondent on four different occasions attempted to and or did evict union representatives from the Columbus Avenue sidewalk, while permitting other groups as detailed above to leaflet, without any interference. It is also notable that Fletcher, the very same official of Respondent evicted Diaz on July 6, observed several groups leafleting on July 1, and made no effort to remove them. Further, Talamo and Finkelstein, who were involved in Respondent's attempts to remove Union representatives on May 11, observed two other leafleters, at the very same time, and made no attempt to remove these individuals.

The fact that Respondent did not attempt to evict Local 100 representatives on other days, I attribute to the fact that the New York Police Department refused to arrest them, as requested by Respondent, and Respondent believed that any other attempts to evict them would not be successful. [10]

Accordingly, in these circumstances, I find that sufficient evidence of disparate treatment has been adduced, which coupled with Respondent's unlawful promulgation of its new policy towards leafleting on the sidewalk, leads me to conclude that Respondent's attempts to evict the Union's representatives were discriminatorily motivated, and violative of the Act, whether or not it had an adequate property interest in the sidewalk.

D. Respondent's Property Interest

It is beyond question that in employer's exclusion of union representatives from public property violates Section 8(a)(1) of the Act, so long as the union representatives are engaged in activity protected by the Act. *Bristol Farms, Inc.*, 311 NLRB 437 (1993). It is also clear that an employer may prohibit solicitation or distribution by nonemployee union representatives on its property if reasonable efforts by the Union through other methods are available to enable it to convey its message, and if the employer's prohibition does not discriminate against the Union by permitting others to solicit or distribute. *Lechmere Inc.*, v. NLRB, 502 U.S. 527 (1992).

However, a significant issue arises where an employer prohibits or excludes nonemployee representatives from engaging in protected conduct on property owned by someone else, but where the employer asserts that it has a property interest in that area, sufficient to exclude these representatives. In such a case,

[10] I note that generally when Respondent demanded that the Local 100 representatives leave the sidewalk, they would refuse. Although at times the New York Police Department would assist in trying to remove the leafleters, the evidence discloses the New York Police Department would not arrest the leafleters as demanded by Respondent.

the employer must meet a threshold burden of establishing that it had at the time it expelled the union representatives, a property interest that entitled it exclude individuals from the property. *Wild Oats Markets, Inc*., 336 NLRB 179, 180 (2001); *Indio Grocery Outlet*, 323 NLRB 1138, 1141–1142 enfd. 187 F.3d 1080 (9th Cir. (1999); cert. denied. 529 U.S. 1098 (2000); *Farm Fresh, Inc.*, t/a *Nicks*, 326 NLRB 997, 1001–1002; enf. granted, in part, and denied in part, 222 F.3d (1030) (D.C. Cir. 2000,) vacated and reversed in part 332 NLRB 1424 (2000). In determining the character of an employer's property interest, the Board examines the language of a lease or other pertinent agreements, in conjunction with the law of the state in which the property is located. *Wild Oats* supra; *Food for Less*, 318 NLRB 646 (1995), enfd. in relevant part as F.3d 733 (8th Cir. 1996).

Applying the principles of the above cases to the instant case, Respondent has the burden of establishing that had a sufficient property interest in the sidewalk to exclude the union representatives from leafleting on the Columbus Avenue sidewalk. In that regard Respondent relies solely on the license agreement that it executed with the City, which gives it the right to "maintain" and "manage" and "schedule events" in the "public areas," which includes the Columbus Avenue sidewalk. However, Respondent has cited no authority either under New York law or Board law, which supports its view that such a license agreement, permits it to exclude union representatives engaged in protected conduct.

Since it is admitted that whatever rights Respondent may have to exclude the union representatives is derived from the license agreement, it is clear that Respondent can have no greater right than is given to it by the city, as the licensee. Thus, as a licensee, Respondent is "entitled to protection against interference by third persons with the use privileged by the license to the extent to which the license gives him possession as against such person." Restatement of the law (First) Property "Servitudes", Section 521 (2). Here the evidence demonstrates that the city, the licensor does not and did not agree with Respondent's view, that the license agreement permits it to exclude leafleters from the sidewalk. This position is made clear by the statement made by the City's attorney Dan Connolly in his September letter to Grubin, which was also received by Respondent. He states therein that "an individual participating in constitutionally protected activities on a sidewalk open to the public (regardless of where the preprietary interest of such sidewalk lies) in a non-obstructive or harassing manner, is not violating the law."

Respondent dismisses this statement of Connolly as "purely Connolly's opinion," in no way determinative of Respondent's interest in the sidewalk, noting particularly that the letter pays no attention to the license agreement, and makes no reference to any statute or case law. I disagree. The statement made by the attorney representing the City, who is in fact, the licensor and the party to the agreement is certainly substantial evidence as to the City's view of Respondent's rights under the agreement. While this statement may not be conclusive, it is certainly persuasive evidence, particularly where, as here, Respondent has adduced no contradictory evidence or authority. Indeed, Respondent notes that Connolly makes no reference to any statute or case law. That may be true, but neither did Respondent, and in the absence of any countervailing evidence or authority, I conclude that Connolly's statement represents the position of the city, that Respondent is not authorized by the license agreement or any other factor, to exclude the union leafleters on the Columbus Avenue sidewalk. See *Snyder's of Hanover, Inc.*, 334 NLRB 183, 184 (Board relies on statement from District Attorney that handbilling activity engaged in by Union on public right of way could not be prohibited as long as it did not pose a danger to others, and did not impede the flow of traffic).

Indeed, the position of the District Attorney in *Snyder's* supra, was essentially the same position taken by Connolly here. Thus, unless the union representatives were engaged in obstructive or harassing conduct, the leafleting is constitutionally protected, and they cannot be found to have violated the law. While Respondent also argues that Connolly make no reference to the license agreement in his letter, in fact he implicitly did by observing that the leafleting is

protected, regardless of the proprietary interest of the sidewalk. This comment is an obvious reference to the license agreement, and the presumed "propietary interest" in the sidewalk that the license agreement grants to Respondent.

Further the evidence is clear that Connolly's position in that letter was not new, and had indeed been communicated to Respondent in the past. Thus, in the letter, Connolly reminded Grubin that he had "repeatedly discussed" that position with her before. Indeed, Grubin's letter to Connolly, which produced his response; relates that both Grubin and Finkelstein (Respondent's General Counsel), complained to Connolly on May 11 about the failure of the New York Police Department to arrest Diaz when he refused to leave the sidewalk.

Moreover, both Talamo and Mirabelli testified that they were made aware that the New York Police Department, based on legal advice from its counsel, was not willing to arrest leafleters on the Columbus Avenue sidewalk, and or that the New York Police Department felt that Respondent did not have the right to remove leafleters from the sidewalk.

Accordingly, since the City, the licensor did not authorize Respondent to remove the leafleters, and believed that the license agreement dd not provide such authority, Respondent had not shown that it has a sufficient property interest in the Columbus Avenue sidewalk.

While Respondent argues, as noted that Connolly made no reference to any statute or case law, [11] in my view, Connolly's brief summary is right on point and consistent with both New York and Supreme Court law.

In 1939, the Supreme Court in *Hague v. CIO*, 307 U.S. 496 59 S.Ct 954, was confronted with an ordinance that prohibited the distribution of circulars, hand bills and placards; as well as requiring a permit for such activity on public streets. The court held that the regulations were unconstitutional and violative of freedom of speech and assembly guarantees of the Fourteenth Amendment. In a much quoted opinion, Justice Roberts discussed the role of city streets.

[11] As also noted above, Respondent provided no statute or case law to the contrary.

> Wherever the title of streets and parks may rest, they have Immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied. 307 U.S. at 515, 59 S.Ct at 963.

The principles expressed in this opinion have been quoted approvingly by numerous subsequent cases. *Jamison v. State of Texas*, 318 U.S. 413, 63 S. Ct. 669 (1943) ("one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word." 63 S. Ct at 672). *Perry Educ-Assn. v. Perry Local Educators' Assn.*, 460 U.S. 948, 103 S.Ct 948 (1983) ("Streets and Parks have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. In these quintessential public forims, the government may not prohibit all communicative activity." 103 S.Ct. at 955); *Amalgamated Food Employees v. Logan Plaza*, 391 U.S. 308, 88 S. Ct. 160, (1968), It is clear that if the shopping center premises were not privately owned but instead constituted the business area of a manicipulity . . . petitioners could not be barred from exercising their First Amendment rights there on the sole ground that title to the property was in the municipulity. The essence of these opinions is that streets, sidewalks, parks and other places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." Footnote omitted. 88 S.Ct at (1607). See also *International Soc. for Krishna Consciousness v. Lee (Iskcon)* 505 U.S. 672 112 S.Ct. 2701 (1992) and *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495 (1988).

This precedent makes clear that sidewalks and streets are considered public forums. This does not mean that the State may not regulate such forae, but it must show that such regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression, which are content neutral; narrowly tailored to serve a significant government interest, and leave open, ample channels of communications. *Perry* supra, *Lebron v. National R.P. Passenger Corp.*, (*Amtrak*), 69 F.3d 650, 655 (2nd Cir. 1995).

Indeed, the above precedent was reviewed and evaluated by both Judges McKenna and Duffy in their consideration of the ban on demonstrations on the Plaza. However, the decisions in these cases were based on their characterization of the Plaza as a limited public forum, which under the case law is not subject to such strict scrutiny, but must only be a "reasonable" regulation and not an effort to suppress the speaker's activity due to disagreement with the speaker's view. *Lebron* supra at 2705. Thus, while the Plaza was found by Judges Duffy and McKenna to be a limited public forum, the same finding cannot be made with respect to the Columbus Avenue sidewalk.

The Plaza was found to be a limited public forum, principally because Respondent has restricted its use to aristic performances. The same cannot be said for the sidewalk, which has been treated historically the same as any other sidewalk. Indeed, the record reveals in fact that Respondent has consistently directed demonstrators and leafleters from the Plaza to the sidewalk to continue their activity.

Therefore, applying the above precedent to the instant facts, it is clear that the city could not issue a blanket prohibition against leafleting on the sidewalk without violating the First Amendment. Since the city cannot do so, then neither can Respondent, as it has no greater rights than the City would have to regulate its sidewalks.

An analysis of New York law reveals a similar conclusion. Thus, the New York Penal Law, Sec. 140.00(3), which defines trespass, provides "a person who regardless of his intent, enters or remains on premises which are at times open to the public does with license and privilege unless he defies a lawful order not to enter or remain, personally communicated to him by the owner or such premises or other authorized person." The New York courts have held that where the property is open to the public at the time of the accused trespass, the accused is presumed to have a license to be present, and "State Trespass laws may not be enforced solely to exclude persons from exercising First Amendment or other protected conduct in a manner consisted with the use of the property. Therefore, a decision to exclude that is predicated on or impermissibly inhibits a constitutionally, or statutorily protected activity will not be lawful." *People v. Leonard*, 62 N.Y. 2d. 404, 408 (1984). Thus in that case the court of appeals reversed a conviction for criminal trespass on the SUNY campus based on an exclusion order from the President. The court concluded that no "lawful order" was issued, even though the president was authorized to generally exclude people from the campus. The opinion concludes that in order to establish that the banishment order was lawful, the state must show that the order had a legitimate purpose rationally related to the use of the property, and that it did not "unlawfully inhibit or circumscribe the defendant from engaging in constitutionally or statutorily protected conduct."

Similarly, in *People v. Rewald*, 65 Misc. 2d. 453, 457 (1971), the court found that a private corporate owner of a migrant labor camp that was open to the public could not asserts a trespass action against a newspaper reporter who did not interfere with the town's activities; or cause danger or otherwise abuse his right to remain. The court found as follows:

> This court is compelled to conclude that mere title or possessory control of premises cannot be determinative of the issues met here. In those cases revealing a public or quasi-public use of premises a determination of the right to impose the penal sanction against trespass must depend upon the degree of pub-

> lic use which the owner permits or invites upon his premises. Public or partial public use of premises, whether under express or implied invitation or permission, carries with it the license to enter and, absent abuse of such privilege, carries with it the correlative license to lawfully remain. In cases such as this, the owner's or possessor's revocation of the right to remain (by denial, request or by order to leave), which will convert the status of the alleged offender from licensee to that of criminal trespasser, must rest upon, and arise from, either reasonable customs and practices, rules, regulations, and/or statutory law, or under circumstances from which a reasonable owner and possessor would anticipate clear and present danger to person, property or the public peace. But in no event, under the circumstances we have here, should revocation of the right to remain be predicated upon mere whim, caprice, or arbitrary choice. To permit arbitrary and capricious ejection from publicly used premises would violate not only the fair intendment of the statutory privilege, but would clearly raise serious questions of fundamental constitutional rights. Our courts have consistently held that the right to exercise trespassory sanction may not be invoked where the use of the premises is public or partially public. Under the circumstances here the court is drawn to the inescapable conclusion that the People have failed to prove any meaningful claim to protection of a right of privacy on the part of the complainant owner, nor has any significant claim been advanced for protection of the normal business operation of the migrant camp. In sum, this court finds that the defendant-appellant did not enter or Remain on the complaimnanmt's premises "unlawfully."

See also *Watchtown Bible v. Frost Society v. Metropolitan Life*, 297 N.f. 339 (1948), where the New York court of appeals while affirming the right of the apartment owner to exclude Jehovah's witnesses from soliciting inside its apartment building, distinguished *Hague*, supra and other cases, thereby implicitly endorsing same, that distribution of literature on public streets and sidewalks cannot constitutionally be prohibited. Accordingly, the above precedent establishes that Connolly was correct in his assertion that the New York Police Department could not legally arrest the leafleters for their conduct of leafleting on May 11 on the Columbus Avenue sidewalk. As Connolly noted, the leafleters engaged in no obstructive or harassing conduct. Moreover they were not in violation of any reasonable time and place requirements set up by Respondent or the city, which could in some circumstances meet constitutional muster. What Respondent did here was to in effect institute and enforce a total ban on leafleting on the sidewalk, would be violative of the First Amendment if done by the city. Respondent cannot have greater rights to exclude leafleters than can the city, since Respondent derives its rights to exclude from the license agreement with the city.

As I have detailed above, Respondent has cited no authority in support of its assertion that its license agreement with the city provides it with a sufficient property interest in the Columbia Avenue sidewalk, to warrant excluding the leafleters. However, *Nicks*' supra, does provide some surface support for Respondent's position, and does require some discussion. In *Nicks'*, the Board found that an owner of stores, located in strip malls, possessed a sufficient property interest in the sidewalks in front of some of its stores, based on its lease agreements with the property owner. These leases gave the owner the responsibility for maintaining the store sidewalks. The Board in receiving Virginia law on trespass, concluded the language in the lease was sufficient to make the store owner "a custodian or other pension lawfully in charge of the sidewalks," and therefore possessed the requisite property interest to maintain a trespass actions. Therefore, the Board found that the Employer did not violate the Act by threatening union agents with arrest for organizational activity on the sidewalks in front of their stores.

However, the Board's decision, in this regard, was reversed by the D. C. court of appeals (222 F.3d 1030), who disagreed with the Board's interpretation of Virginia law. The court found that the lease did not provide sufficient evidence of "control" of the sidewalk under Virginia law to justify a trespass violation. It therefore remanded the case to the Board for further processing.

The Board thereafter, accepted the court's finding as the law of the case, and found consistent with the court's opinion, that the employer therein did not have the requisite property interest to threaten union organizers with arrest for protected conduct on the sidewalk, and thereby violated Section 8(a)(1) of the Act. *Nicks*', 332 NLRB 1424 (2000).

Thus, while I as an Administrative Law Judge am bound by Board law, the history of this case as disclosed above, suggests that it is of dubious authority in support of Respondent's position. Nonetheless, even assuming its viability as precedent, the facts therein are clearly distinguishable from the instant matter, in several significant areas.

First and foremost, that case does not involve a "public" sidewalk or property owned by the city. It related solely to private property, and whether or not the owner of the property gave a sufficient property interest in the sidewalk to the store owners by the terms of the lease between them. Thus, no first amendment considerations were implicated.

Secondly, unlike our case, there is no evidence in *Nicks'* that the owner of the property disagreed with the store owners view, that the lease allows it to exclude the union representatives. Here, as detailed above, the city, the party from whom Respondent derives its alleged right to exclude the leafleters, did not believe that the license agreement permitted Respondent to remove leafleters from the sidewalk, absent obstructive or harassing conduct.

Third, *Nicks*' is based on the Board's interpretation of Virginia law, and here as discussed above, New York law provides no support for Respondent's position that it could expel the union representatives from the Columbus Avenue, or that they could be successfully prosecuted for trespass for the failure to comply with such an order of expulsion. Therefore, I find *Nicks'* supra not to be dispositive, and that the numerous cases that I have cited above, support my conclusion that Respondent did not have the requisite property interest to evict the leafleters from the Columbus Avenue sidewalk.

Respondent also makes the alternative argument that as to May 11, regardless of the terms of the license, it had the requisite property interest to exclude the leafleters, by virtue of the

court order issued by Judge Baer. Once more, I cannot agree with Respondent's assertion in this regard. Once again, I note that regardless of the court order, Respondent's interest in the Columbus Avenue sidewalk, is derived solely from its relationship with the city, the owner of the property. It is clear that the city was aware of the court order, as it was a signatory to the underlying settlement agreement, and indeed Grubin referred to the Court Order in complaints to Connolly about the New York Police Department's failure to arrest the leafleters. Thus, the city, by Connolly, with full awareness of the existence of the court order, continued to maintain its position that an arrest is not warranted, absent obstructive or harassing conduct by the leafleters. Therefore, on that basis alone, the court order does not provide a sufficient property interest to Respondent in the sidewalk.

Further an examination of the terms of the order reveals substantial ambiguity as to its scope. Thus, the record is clear that the order was issued based on a proceeding relating to the conduct of a rally on the sidewalk. Thus, since the rally clearly ended at 6:15 p.m., and the rally continued across the street at Dante Park, it is not clear that the Agreement covers leafleting which as note had been engaged in on the Columbus Avenue sidewalk, with little or no interference prior thereto.

Moreover, while the order did provide that all union representatives "acting in concert and participation with", will leave "Lincoln Center property by 6:15 p.m." it is significant that the Columbus Avenue sidewalk is not Lincoln Center property. Therefore, the leafleting after 6:15 p.m. was not on Lincoln Center property and cannot be reasonably viewed as violating the Order.

Finally, it is significant that Respondent subsequent to May 11, made no attempt to go back to Judge Baer, to assert that the Union has violated his Order. Indeed, in my view, this was the appropriate procedure to follow, if Respondent believed that the Union's leafleting was contrary to the Order. The failure of Respondent to do so, I believe is an implicit admission by Respondent that it knew that the leafleting after 6:15 p.m. was not in violation of the Order.

Accordingly, I find that Respondent's assertion that Judge Baer's Court Order provides a sufficient basis for it to have attempted to evict the leafleters is without merit.

That brings me to an evaluation of Respondent's conduct on May 11 and June 28, where Respondent contends that General Counsel has failed to adduce sufficient evidence of a violation, even assuming that it did not have a sufficient property interest in the Columbus Avenue sidewalk. In that regard, Respondent vigorously disputes any finding based on the conduct of Evelyn Finkelstein for various reasons.

Initially, it objects to any finding of a violation based on such conduct, because the complaint did allege her to be an agent or supervisor of Respondent, and further that no proof was adduced establishing her agency status.

Respondent is correct that the complaint does not allege Finkelstein as an agent of Respondents. When General Counsel began asking questions of Diaz about Finkelstein's conduct, Respondent objected on the grounds that it had no notice of Finkelstein being alleged to an agent of Respondent. At that time, General Counsel asserted that there was policy of either the Region or the Agency, that attorney's are not named in the complaint as agents of Respondents. I responded that I was unaware of such a policy, and in any event, the policy did not address the issue of notice to Respondent. I added that I felt that General Counsel might want to consider amending the complaint to allege Finkelstein as an agent. However, I permitted the testimony concerning Finkelstein, principally because I failed to see how Respondent was prejudiced by the failure to name her as an agent in the complaint. In that regard, I note that Ms. Finkelstein made an appearance on Respondent's behalf, was present throughout the entire trial, and assisted Respondent's Counsel in the litigation of the case. Moreover, the trial was held on July 11 and July 12, and then was adjourned to July 25, so that the parties could evaluate a tape recording of the events of May 11, made by an agent of the Union. Thus, Respondent had ample time to prepare Finkelstein to testify to the allegations against her. However, it chose not to call her as a witness.

In these circumstances, I find that although in my view, it might have been appropriate to name Finkelstein as an agent in the complaint,[12] that no prejudice was shown to Respondent, from the failure to allege Finkelstein as an agent in the complaint. Respondent was put on notice on the first day of trial that General Counsel was contending that Respondent was responsible for Finkelstein conduct, and was afforded more than full opportunity to litigate her status and her conduct. Moreover, it has provided no indication that its trial strategy would have been any different, had it known about the allegation as to Finkelstein's status in the complaint.

Therefore, based on the above, Respondent was not deprived of due process, and suffered no prejudice from the failure to name Finkelstein in the complaint. *Carpenters Local 608 (Various Employers)* 304 NLRB 660, 662–663 (1991) (Respondent Union not deprived of due process by failure to name secretary in hiring hall as an agent in complaint, since Union given full opportunity to litigate status and conduct of secretary).

Respondent also contends that General Counsel adduced no evidence of agency status of Finkelstein. However, in my view, the General Counsel for a company is considered an agent, as long as the conduct is within the scope of the attorney's authority. *Local 3 IBEW* (*Burroughs Co.*), 281 NLRB 1099, 1101 (1986) (Strike Threat by attorney in telephone conversation to attorney for company); *Central Cartage, Inc.*, 236 NLRB 1232, 1254 (1978); and *Iowa Beef Processing, Inc.*, 226 NLRB 1372, 1374–1375 (1976), enfd. in pert. part, 567 F.2d 791, 796 (8 Cir. 1977). More to the point is *Wild Oats*, supra, where the Board and the ALJ relied in part on the presence of the Employer's attorney, when the agent of the property owner requested that the police remove union representatives from the parking lot in front of the Employer's store. I also note, as related above, that Finkelstein, as General Counsel made an appearance on the record on behalf of Respondent, and assisted Respondent in the

[12] Although General Counsel may have an internal policy of not naming attorney's as agents in complaints, this policy is not binding on me, and does not address the issue of notice to Respondent and an opportunity to defend itself properly.

litigation of the instant case. Moreover, the evidence discloses that Finkelstein, on behalf of Respondent, made phone calls to Connolly complaining about the failure of the New York Police Department to arrest union demonstrators.

Based on all the above circumstances, I conclude that the evidence is more than sufficient to establish that Finkelstein was acting as an agent for Respondent on May 11. I so find.

Turning to that conduct, Respondent argues that General Counsel's evidence, falls short of establishing that Finkelstein engaged in any conduct violative of the Act. Thus, Respondent argues that Finkelstein made no statements directly to Diaz or any union officials, and that the record does not disclose to whom she was speaking on the phone. Therefore, General Counsel has failed to prove that she threatened to arrest anyone, or that she caused the police to thereafter to arrest Diaz.

However, I agree with General Counsel that the circumstantial evidence is sufficient for me to conclude, which I do, that when Finkelstein requested on the phone that she wanted Diaz arrested for leafleting, that she was speaking to someone from the New York Police Department, or the City, and that as a direct result of this call, three or four minutes later, two policeman threatened Diaz with arrest for criminal trespassing and violation of a Court Order. In that regard, I rely on the timing of the threat by the police, coupled with the fact that other evidence (Grubin's letter) discloses that Finkelstein called Connolly to complain about the New York Police Department's failure to arrest Diaz. Additionally, I find it appropriate to draw an adverse inference from the failure of Respondent to call Finkelstein as a witness, and find that if called she would have admitted that she called the New York Police Department to have Diaz arrested. *IBPO* supra; *United Parcel* supra; *International Automated* supra; *Ready Mix*, supra.

Accordingly, I conclude that Respondent by Finkerlstein requested that the police arrest Diaz and that the police subsequently threatened to arrest Diaz and the Union representatives. By such conduct, Respondent has violated Section 8(a)(1) of the Act. *Wild Oats* supra (Board finds Employer indirectly responsible for conduct of police of threatening arrest of union officials, based on Employer's questioning of property owner as to its policy on distribution, and the presence of attorney, when police made threat); *Winco Foods*, 337 NLRB 289, 293 (2001) (Employer telephoning police and expressing his desire that handbillers be removed from property, responsible for subsequent threat to arrest by police). *Indio Grocery* supra (Employer violated Act by requesting and attempting to cause police officers to arrest Union representatives).

Furthermore, also on May 11, I have found, based on Talamo's own testimony, that he personally approached Diaz, ordered him to leave the sidewalk, and threatened to consult the police if he didn't leave. Talamo then requested the police to remove Diaz, but the officer declined to take any action. Therefore, apart from any conduct of Finkelstein Respondent has violated Section 8(a)(1) of the Act on May 11, by Talamo's actions described above. *USCF Standard Health Care*, 335 NLRB 488 (2001), *Food for Less* supra; *Indio Grocery* supra, *Bristol Farms* supra.

On June 28, I have found that Talamo approached Diaz and three other union officials leafleting on the sidewalk. He informed the union representatives that they could not leaflet, because they were in violation of a Court Order. Talamo then threatened that they would be arrested if they did not leave.

When the union representatives would not leave, Talamo spoke to a police officer. Two or 3 minutes later, that same police officer told Diaz and the other union representatives that if they didn't leave, they will be arrested for criminal trespassing and violations of a court order. Diaz asked who the complainant would be, if they were arrested. The police officer then went up the stairs, spoke to Talamo, and returned to Diaz. He handed Diaz Talamo's card, and said that Talamo would be the complainant. The union representatives then left.

Based on these facts, I conclude that Respondent has further violated the Act, by attempting to evict the union representatives from the sidewalk, threatening them with arrest if they did not leave, and causing the police to threaten to arrest and to evict the union representatives from the Columbus Avenue sidewalk. *Indio Grocery* supra; *Food for Less* supra; *Bristol Farms* supra*; Winco Foods* supra.

General Counsel also contends that a separate violation is appropriate, warranting a separate cease and desist Order, based on Talamo's conduct in falsely asserting that Respondent had a Court Order entitling it to seek the removal of the union representatives. Although it is not totally clear, what specific examples of this conduct General Counsel is referring to, it appears to be Talamo's assertion on June 28. Thus, on that date, there was no court order in effect pertaining to the sidewalk, since the only evidence in the record of court orders was a prior order relating to the Plaza, and the May 11, order from Judge Baer.

However, without deciding whether or not the false assertion of the existence of a court order, justifying removal of union representatives from engaging in protected conduct, constitutes an independent violation of the Act, I deem it inappropriate to find a violation on this record. There was no allegation in the complaint to this effect, and no assertion by General Counsel during the course of the trial, that it believed that conduct was violative of the Act. Therefore, the issue was not fully litigated, and I shall not make a finding as to this assertion.

CONCLUSIONS OF LAW

(1) The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(2) The Union is a labor organization within the meaning of Section 2(5) of the Act.

(3) By discriminatorily promulgating rule prohibiting the distribution on the Columbus Avenue sidewalk, of leaflets or discriminatorily enforcing a prior rule more stringently, in order to discourage protected conduct by representatives from Local 100, on February 26 and April 25, Respondent has violated Section 8(a)(1) of the Act.

(4) By discriminatorily excluding union representatives from handbilling on the Columbus Avenue sidewalk, while allowing nonunion individuals to engage in the same conduct; Respondent has violated Section 8(a)(1) of the Act.

(5) By requesting police officers to arrest representatives of the Union, attempting to cause and causing the police officers to remove and to threaten to arrest union representatives, and by ordering union representatives to leave and threatening them

with arrest, if they did not cease leafleting on the Columbus Avenue sidewalk, on May 11 and June 28, Respondent has violated Section 8(a)(1) of the Act.

(6) The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action that will effectuate the policies of the Act.

On these findings of facts and conclusions of law, and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Lincoln Center for the Performing Arts, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) In discriminatorily promulgating rules prohibiting the distribution of leaflets or the engaging in any other concerting activity, on the Columbus Avenue sidewalk, or enforcing prior rules more stringently, in order to discourage protected conduct by representatives of Local 100 Hotel Employees Restaurant Employees International Union AFL–CIO, (Local 100).

(b) Discriminatorily prohibiting Local 100 representatives from distributing leaflets on the Columbus Avenue sidewalk, while allowing nonunion individuals to engage in the same conduct.

(c) Promulgating and threatening to enforce by arrest or otherwise any ban upon protected activity by nonemployees in areas that it does not own or posses a sufficient property interest to exclude,

(d) Evicting, attempting to evict, threatening to arrest, or requesting that the police remove or arrest, representatives from Local 100 engaged in handbilling or other protected conduct, on the Columbus Avenue sidewalk, or any other area for which the Respondent does not have a sufficient property interest to evict.

(e) In or like or related manner interfering with, coercing, or restraining employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its rule prohibiting the distribution of handbills or leaflets on the Columbus Avenue sidewalk.

(b) Within 14 days after service by the Region, post at its New York, New York facility, copies of the attached notice marked "Appendix"[14] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event, that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 26, 2000.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 1, 2002

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discriminatorily promulgate rules prohibiting the distribution of leaflets or the engaging in any other concerted activity, on the Columbus Avenue sidewalk, or enforce prior rules more stringently, in order to discourage protected conduct by representatives of Local 100 Hotel Employees Restaurant Employees International Union AFL–CIO, (Local 100).

WE WILL NOT discriminatorily prohibit Local 100 representatives from distributing leaflets on the Columbus Avenue sidewalk, while allowing nonunion individuals to engage in the same conduct.

WE WILL NOT promulgate or threaten to enforce by arrest or otherwise any ban upon protected activity by nonemployees in areas that we do not own or possess a sufficient property interest to exclude.

WE WILL NOT evict, attempt to evict, threaten to arrest, request that the police remove or arrest, representatives from Local 100 engaged in handbilling or other protected conduct, on the Columbus Avenue sidewalk, or in any other area for which we do not have a sufficient property interest to evict.

WE WILL NOT in any like or related manner interfere with coerce or restrain employees in the exercise of their rights guaranteed by Section 7 of the Act.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL rescind our rule prohibiting the distribution of handbills or leaflets on the Columbus Avenue sidewalk.

LINCOLN CENTER FOR THE PERFORMING ARTS

Mindy Landow, Esq., for the General Counsel.
Peter D. Conrad, Esq. (Proskauer Rose LLP), of New York, New York, and *Evelyn Finkelstein, Esq.*, for the Respondent.
Michael Anderson, Esq. (Davis Cowell and Bowe), of Boston, Massachusetts, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. On April 1, 2002, I issued a decision and recommended Order in the original case JD-(NY)-19–02, finding, inter alia, that Respondent violated Section 8(a)(1) of the Act.

Thereafter, on May 15, 2002, Respondent filed a motion to reopen the record in order to "adduce additional evidence demonstrating that the principal witness testifying on behalf of the General Counsel, whose testimony was relied upon by the administrative law judge, appears to have committed perjury and concealed relevant and material evidence from Respondent."

On July 17, 2002, the Board granted Respondent's motion to reopen the record, and remanded this matter to me in order to develop testimony on the issues raised in Respondent's motion and for the issuance of a supplemental decision.[1]

The reopened hearing was held before me in New York, New York, on December 5, 2002. At the close of the hearing, I granted Respondent's request to hold the record open for the receipt of an anticipated decision by Judge Loretta A. Preska on a motion for sanctions made against Local 100 by the Metropolitan Opera Association (the Met) in its civil action against Local 100 and its officers. On January 28, 2003, Judge Preska issue her decision 2003 U.S. Dist. LEXIS 1077 (S.D., N.Y. January 28, 2003) which is pursuant to my ruling made part of this record.

Briefs have been file and have been carefully considered. Based upon the entire record, including my observation of the demeanor the witnesses, I make the following:

FINDINGS OF FACT

I. PROCEDURAL RULINGS

In a conference call prior to the resumption of the instant hearing, I made certain procedural rulings regarding the scope of the hearing and what evidence I was prepared to hear.

The issues were also discussed on the record at the opening of the hearing, and Respondent submitted an offer of proof, detailing the evidence and testimony that it wished to submit. I affirmed my previous ruling and rejected Respondent's offer. Respondent, in its brief, reviews its request to submit said evidence before the supplemental decision is issued.

Respondent sought to call Attorney Sharon Grubin, general counsel for the Met, as a witness concerning various issues, particularly "the position taken by the City of New York regarding the proprietary rights of Lincoln Center . . . the background and reasons for the letter written by Lincoln Center and the Metropolitan Opera Association to the Mayor of New York City in April of 2000 concerning Lincoln Center's policy of enforcing its property rights on the Columbus Avenue sidewalk; and . . . the reasons the non-Union leafleters who were present on that sidewalk on May 11, 2000 were not asked to leave."

This proposed testimony relates primarily to my findings that I made in my decision, concerning the position of the City of New York with respect to Respondent's right to exclude leafleters from the Columbus Avenue sidewalk and the motivation for Respondent's decision to institute a new policy and or decide to enforce an old policy, which I found to be at least in part motivated by the Union's protected conduct. However, in my view, as I expressed previously, these matters are not related to or dependent upon the testimony of Diaz, and were therefore not evidence that the Board contemplated being heard in the instant remand.

The Board's order remanded to develop testimony "on the issues raised in Respondent's Motion." The motion made no reference to the testimony of Grubin, or any of the issues raised by her testimony, that Respondent now seeks to offer. To be sure, Respondent in its reply to the position statement of General Counsel and Charging Party, did submit an affidavit from Grubin, which in the last paragraph did make reference to these matters. However, it appears that in that regard, Respondent was merely seeking to argue that once Diaz' testimony is discredited, as it believes is appropriate, the entire case should be dismissed. Respondent, obviously recognizing the deficiency in this argument, since the findings with respect to the City's position, and the letter to the Mayor, were not impacted at all by Diaz' testimony, attempted to show that the findings I made were wrong, based on "inadmissible hearsay", or otherwise unsupportable. This is clearly an attempt to give Respondent a second chance to present evidence, that it could have and should have presented at the initial hearing.

This evidence is not newly discovered or previously unavailable, unlike the evidence concerning Diaz' alleged perjury, which the Board's order clearly contemplates being heard.

I note in this regard that when I received into evidence the letter from Dan Connolly, the City's attorney, to Grubin, Respondent vociferously objected. I received it anyway, pointing out to Respondent on the record that I viewed the statement made by Connolly represented at least some evidence of the City's position concerning Respondent's right to exclude leafleters from the Columbus Avenue sidewalk, but that Respondent was free to call Connolly or any other witness to refute or explain this statement in the letter. Indeed, Respondent's attorney, in objecting to the letters' introduction, stated that it might be necessary to call someone from the New York City Police Department or the Corporation Counsel's office. However, although there was a postponement of the hearing from July

[1] Member Liebman dissented from this decision, concluding that "the testimony and evidence in dispute, if adduced and credited, would not compel a different result as required by Section 102.48 (d)(1) of the Board Rules and Regulations. Rather, the effect of the evidence would be to merely discredit, contradict or impeach a witness, which is insufficient to warrant a reopening of the hearing."

12–25, 2001, Respondent failed to call Grubin, Connolly or any other witness to refute or explain Connolly's statement in his letter. That was the time when Respondent should have called Grubin as a witness, and it cannot do so now in the remanded hearing, which was remanded for the sole and limited purpose of assessing Diaz' credibility, in view of the new evidence found in his deposition testimony.

Similarly, I made findings with respect to Respondent's conduct concerning the letter to the Mayor. These findings were again not dependent on Diaz' testimony, and Grubin's purported testimony which could refute my findings with respect to the letter, is not newly discovered or previously unavailable, and also could and should have been adduced at the initial hearing.

Also, Respondent sought to call Grubin to ask her about the events of May 11, 2002, and particularly about her conversations with Lieutenant Albano of the New York City Police Department about removing leafleters. However, this evidence is once again not newly discovered, nor previously unavailable. Nor is it directly related to Diaz' credibility.

Respondent also sought to introduce evidence from Grubin as well as Evelyn Finkelstein, General Counsel for Respondent, and Charles Sims, attorney for Respondent in the related civil case before Judge Baer. In my decision, in response to Respondent's argument that Judge Baer's order provided it with a sufficient property interest to exclude the leafleters, I rejected this contention for a number of reasons, including the fact that Respondent had not made an attempt to go back to Judge Baer, and seek a contempt finding against the Union.

Respondent seeks to adduce evidence that it did in fact try to seek relief from Judge Baer, but was not successful, because the Judge believed that he was without jurisdiction, since the action was dismissed. However, as with the other evidence proffered by Respondent, this evidence has no relationship to Diaz' testimony, is not newly discovered or previously unavailable, should or could have been introduced at the initial hearing, and was not contemplated to be part of the remanded hearing by the Board.

Finally, Respondent sought to introduce evidence of the Union's alleged "discovery abuses" in the Met Opera action, wherein Diaz' alleged "perjury" was discovered. According to Respondent, such evidence would show that the Union was refusing to produce in that action, the very same documents, i.e., Weekly reports of the Union's employees including Diaz, that Diaz lied about in the instant hearing. Therefore Respondent contends that Diaz' alleged perjury in the NLRB hearing is part of a pattern of deceit engaged in by the Union in the Met Opera action.

After listening to extensive argument on the subject during the conference call and on the record at the reopened hearing, which included assertions made by counsel for Met Opera, I concluded that I would not permit testimony concerning the "discovery abuses" of the Union. I stated then, and I reaffirm that ruling now, that whatever relevance there might be to this evidence to the issues before, is outweighed by the time it would take to litigate difficult discovery issues.

Moreover, I did agree to Respondent's request to hold the record opened to receive Judge Preska's ruling on Met Opera's request for sanctions, which would presumably detail these discovery abuses. In fact, Judge Preska did issue a 66-page decision, which set forth in significant detail, the conduct of the Union and its representatives during discovery. I have carefully reviewed that decision, and it will be discussed more fully below. However, particularly since that decision is part of the record herein, I reaffirm my ruling to bar Respondent from adducing testimony concerning the "discovery abuses" of the Union.

I also reaffirm my other rulings, detailed above, concerning Respondent's requests to adduce additional evidence, and shall now proceed to consider the matters that I believe are contemplated by the Board's remand order.

II. FACTS

Respondent's motion is based on the assertion that Diaz committed perjury during his testimony on July 11, 2001, in two separate exchanges, during his cross-examination by Respondent's counsel.

Diaz testified concerning the events of May 11, 2000, and more particularly that he overheard Evelyn Finkelstein on a cell phone demanding that he be arrested.

Diaz was extensively questioned by Respondent's counsel with respect to his testimony about that incident. In the midst of cross-examination about that testimony, which took three pages in the transcript, the following questions were asked by Respondent's attorney, and the following responses by Diaz were given, which Respondent contends constituted perjury by Diaz.

> Q. [By Mr. Conrad] Did you make any notes about what you heard said at that time? At that time did you make any notes of what you had overheard?
>
> A. Well right after I heard that -
>
> Q. Please answer the question.
>
> A. I didn't make no notes
>
> Q. You didn't make any notes?
>
> A. No.
>
> Q. Did you make any notes of what had happened there while you were leafleting at the bottom of those steps in front of Avery Fisher Hall at any time.
>
> A. I could have written some notes
>
> Q. I'm not asking you to guess. Did you or didn't you
>
> A. I can't remember
>
> Q. Do you keep a diary?
>
> A. No.
>
> Q. Do you keep a calendar of your appointments
>
> A. A calendar of what's going on, yes. But I don't save them
>
> Q. Do you log what you do on a day-to-day basis? Your activities on behalf of Local 100?
>
> A. No.

After this exchange, Respondent resumed questioning of Diaz regarding "the individual you overheard on the phone," for an additional four pages of testimony.

Diaz also furnished testimony that on July 1, 2000, he went to Respondent's premises on his day off, observed groups other than the Union distributing leaflets on the Columbus Avenue

sidewalk, and that these groups were not asked to leave by Respondent's officials. Diaz also testified that he collected leaflets from these individuals on that day, and dated them July 1, 2000.

During Diaz' cross-examination about the events of July 1, 2000, the following exchange took place, which Respondent also asserts reveals perjurious testimony by Diaz

Q. Did you make any notes about the events of July 1st?

A. July 1st? The leaflets. I wrote the notes on the leaflets.

6:30—

Q. The times?

A. The times.

Q. Is that the full extent of the notes that you took?

A. Yes

JUDGE FISH: You have to say yes.

Q. Now you [sic] affidavit was given on June 30th, so there is no mention, of course, in here about the events of July 1st or July 6th. But did you make no record of those events—well, I guess you did. You said you made the notes on the leaflets.

Okay.

JUDGE FISH: You have to answer.

A. Yes,

Q. But you don't have anything at all from July 6th, do you?

On or about July 6th.

A. No.

Q. These leaflets that are in evidence now as General Counsel's

Exhibit Number 7, do you remember giving them to the NLRB?

Yes.

And when? Did you give them to the NLRB at around the time that you obtained them?

A. No.

Q. When did you give them to the NLRB?

A. Recently.

Q. And where have they been maintained since you obtained them?

A. I had them in a folder.

Q. Were you involved in gathering any documents pursuant to a subpoena that I served on Local 100?

No.

Q. No? You received a subpoena, correct?

A. Correct.

Q. And then you turned it over to a lawyer for Local 100?

A. Correct.

Q. Did you have anything to do with it after that?

A. No.

Q. No one asked you for any documents that you had?

A. What was being requested, there is a person that's in charge of keeping the leaflets and stuff like that.

Keeper of records. Weren't you saying before that you kept a file of your own?

A. No. I kept a file for this day only. I kept that file.

Q. A file just for the one day?

A. That day?

Q. Why just for the one day?

A. That's what I did?

Q. And no other file at all?

A. No. That's it.

Q. Everything else during this whole period of time you turned over to someone else?

Someone is in charge of keeping all the records; that if there are any leaflets that person puts it on file has a file with all the leaflets.

Q. Who is that file?

A. Mr. Gooderman.

Q. What is Mr. Gooderman's job at the Local?

A. Researcher.

Respondent's contention that Diaz lied during his testimony on July 11, 2001, is based on the fact that during the Met Opera litigation, it was disclosed that Diaz filled out "staff weekly reports," and "date books," and that Diaz kept more than one file, contrary to his trial testimony.

The "date book," which Respondent argues is a "calendar," was turned over to Met Opera in August of 2001, pursuant to prior document requests, and were used by Met Opera's counsel in examining Diaz in his deposition on November 15, 2001. During this deposition, Diaz disclosed that he also filled weekly reports which "shows what we do on a daily basis." At that time Met Opera's counsel demanded that weekly reports for Diaz as well as other Union officials be turned over to it, asserting that these documents would have been called for by a number of prior document requests.

On January 10, 2002, the Union answered Met Opera's interrogatories concerning compliance with discovery obligations. Diaz' responses reflected that he had a entire drawer full of Met Opera Restaurant and Lincoln Center documents, and that he has a file folder for each shop in the two drawers of his file cabinet.

Additionally, Diaz indicated that he "also maintained my date book," and in answer to another question, stated that "sometime after May 25, 2001, I was instructed to keep my date book and to hand over earlier date books for copying." Finally, Diaz also in response to another inquiry, stated,"Ms. Yen asked me to update my date book just before my deposition."

Diaz furnished testimony during the remanded hearing on December 5, 2002, concerning the various documents described above, and why he did not disclose to Respondent the existence of these documents, in answer to Respondent's inquiries on July 11, 2001.

Diaz is a salaried employee, who does not have set hours, but generally works about 55 hours per week, including frequently on weekends. He does not receive overtime or compensatory time for weekend work.

Diaz maintained during his employment with the Union a document which he refers to as a "date book," which is a small booklet, entitled "week at a glance appointments . . . for planning, appointments and memoranda on a weekly basis." The

book consists of a page for each week, with spaces for each day to put in appointments or other material. The notations that Diaz places in this date book are according to Diaz short notations of his scheduled appointments. A review of these "date books" tends to corroborate Diaz' testimony on this subject. The entry for May 11, 2000 states, "Met Opera action." For June 28, 2000, the entry is "tentative swing action."

According to Diaz, he testified in July 2001, that he did not keep a "diary," or a "calendar of his appointments," and that he did not "log what you do on a daily basis", primarily because he believed that these questions related to documents which reflect the conversation that he heard between Evelyn Finkelstein and someone else on May 11, 2000. Further, Diaz testified that he did not consider his "date book" to be a calendar of appointments, since the calendar he referred to in his testimony was a calendar of union related matters that is posted at the union hall. He also asserted that he did not consider his date book to be a "diary," or a "log," since in his view a diary or a log are detailed statements of events after they occurred, which information is not contained in his "date books."

Diaz also prepares as noted, "weekly staff reports," which are required to be filled out by him for pay purposes, and is then given to the Union's secretary. According to Diaz, these reports list his daily activities, and he prepares them by consulting his date book, and transferring the entries from the date book to the weekly reports.

Once again, Diaz testified that he did not mention these weekly reports to Respondent's counsel in July 2001, because he believed that he was being asked about his testimony concerning Evelyn Finkelstein, and the weekly reports contain no information about that testimony. Furthermore Diaz also testified that he did not consider the weekly reports to be a "log" of his activities, since it was not a detailed description of events, which is what Diaz considers to be a "log."

A review of the weekly reports prepared by Diaz does reflect that they are similar to his date books and that they generally contain brief description of his activities such as "team meeting," "organizing meeting" names of shops visited, or states "office." For May 11, 2001, his weekly report states "Met Opera Rally," which is identical to his date book entry for that date. For Wednesday, June 28, 2000, his weekly report stated, "Staff Meeting Office." In contrast his date book reads "Leads Meeting," and "tentative swing action 7—9 p. m."

Furthermore, while Diaz testified that he generally prepares his weekly reports by transferring entries from his date book to his weekly reports, an examination of these documents, reveals that at least in some instances there are entries in Diaz' weekly reports, for which there is no corresponding entry in his date book over a three year period from 1999-2001.[2]

Diaz was asked about one instance, where his date book contained an entry for Angelo and Maxis on Saturday March 27, 1999, but his weekly report did not contain any entries for that day. Diaz could not recall what happened in 1999 with respect to these entries, but speculated that since he also had entries for Wednesday, March 24, 1999, for that restaurant on both his date books and weekly reports, that he might not have gone as scheduled to that restaurant on March 27, 1999.

Moreover, for Saturday, July 1, 2000, neither Diaz' date book nor his weekly report contained any notation that Diaz was at Lincoln Center on that date. In fact both documents contain no notations at all for that date. As noted, I found in my prior decision that Diaz had gone to Lincoln Center on July 1, 2000, on his day off, and that he observed various groups leafleting on the Columbus Avenue sidewalks, while no attempt was made by representatives of Respondent to evict them.

Diaz attempted to explain the omission of an entry for that date in his date book or weekly report, by asserting that Saturday was his day off, and he made the trip on his own time, so he did not include it on his weekly report. Further since he had not made an appointment to go there, he did not record the visit in his date book. He added that the visit did not appear on his weekly report, because it wasn't in his date book, and the entries in his weekly report were transferred from his date book.

Diaz also furnished testimony at the reopened hearing, concerning his July testimony about files. Diaz maintains a Met Opera draw, which consists of organizing information about the Union's organizing efforts among Restaurant Associates employees, employed at Met Opera. This file includes organizing sheets, names and addresses of workers and anti-union literature distributed by the Company.

Diaz testified that he did not mention these files when he testified on July 11 that he kept only one file, because he was asked by Respondent about the July 1, 2000 incident, and the folder of leaflets that he collected on that day.

Respondent observes that its questions were not so limited, and referred specifically to the documents subpoenaed by Respondent from the Union in the initial hearing. The subpoena called for the production of the following documents from the Union.

RIDER TO SUBPOENA DUCES TECUM NO. 349341

1. Copies of all memoranda, letters, notes, affidavits, statements, photographs, videotapes, audiotapes, journal/log entries orother writings or recordings of any kind that discuss, record, document, refer to or relate to any alleged threats made on May 11 and June 28, 2000 by agents of Lincoln Center for the Performing Arts, Inc. ("Lincoln Center") and/or the New York City Police Department, to arrest H.E.R.E., Local 100 ("Local 100") representatives because they attempted to hand out leaflets on the lower sidewalk on the west side of Columbus Avenue, in front of and below the main Lincoln Center Plaza (hereinafter referred to as the "Lower Sidewalk.")

2. Copies of all leaflets, handbills, flyers, brochures, petitions or other written materials that Local 100 representatives allegedly attempted to hand out on the lower Sidewalk on May 11 and June 28, 2000.

3. Copies of all applications, in any form, made by Local 100 to Lincoln Center or to the City of New York and/or Department of Parks and Recreation, for permission to conduct leafleting, picketing, a demonstration, a

[2] The record reveals some 46 instances, where entries in the date book do not appear in Diaz' weekly report.

vigil, or any other similar form of concerted activity on the Lower Sidewalk on May 11 or June 28, 2000.

4. Copies of all memoranda, letters, notes, affidavits, statements, photographs, videotapes, audiotapes, journal/log entries, or other writings or recordings of any kind that discuss, describe, record, document, refer to or relate to any leafleting or picketing, and demonstration or vigil, or any other similar form of concerted activity by any persons, associations, groups or organizations, including but not limited to labor organizations, at any time prior to or after April 25, 2000, if such activities are to be relied on as the basis for any claim by Local 100 in unfair labor practice case No. 2-CA-32983 that Lincoln Center has discriminated in the enforcement of its alleged rights in the Lower Sidewalk.

As related above, I have received into evidence, Judge Preska's opinion, dated January 28, 2003, in which she granted motions made by Met Opera for sanctions against the Union and its counsel, and rendered judgment as to liability against defendants and attorneys fees because of discovery abuse by defendants and their counsel.

Judge Preska's decision, which was made without the benefit of a hearing, was primarily focused on discovery abuses by Respondent's counsel, with emphasis on its failure to properly supervise the compilation of documents requested, and the failure to devise an adequate system for the compilation and retention of documents requested by Met Opera.

Judge Preska also made several findings concerning the weekly reports, filled out by union officials, including Diaz, which as noted above is one of the documents that Respondent claims that Diaz lied about in his July 2001 testimony.

Judge Preska found that William Granfield, the current president of the Union, lied in his deposition about whether union members working on a campaign against the Met filled out reports of their activities, referring to the same staff weekly reports in issue herein. The judge also made several findings, which Respondent alleges are pertinent the issues before me. They include:

- That "[s]everal of plaintiff's document requests called for the production of the [weekly] reports kept by Diaz and other Local 100 representatives, but they were "never produced or otherwise made known in document production or deposition testimony." Id. at 51
- That "[i]n attempting to explain his apparently prejurious testimony denying that he had provided written reports to the International with respect to his activities," Granfield stated he "does not consider his weekly time records to be 'written reports to the International with respect to [his] activities;''' rather, "the reports instead account for his time using general phrases or words to explain where he has been during each day of a pay period." Id. at 56.
- That "when [Union counsel Marianne] Yen finally agreed to produce the Weekly Reports, she decided (she did not inform Met counsel) that she would produce them only for those people for whom the Met had requested day planners and calendars." Id. at 111.
- That "[I]t was only after the court ordered [Yen} to do so that she obtained . . . [weekly] reports [submitted to the International's office]." Id., at 142.
- That "[t]he Met [did not] receive [ ] Tamarind's and Grandfield's Weekly Reports [until] December 28, [2002,] three days before the close of discovery," and that "[t]here was significant gaps even in that production." Id. at 113, M.23
- That "as set out in excruciating detail [in the Met's declarations and other supporting papers] scores of clearly responsive documents (some of which, like Weekly Reports, were expressly ordered to be produced) have never been produced." Id. at 151.
- That "[t]he Weekly Reports were called for in the Met's first document request . . . and were of obvious relevance in documenting activities that are the subject of this action," that "Granfield falsely denied their existence," and that "all such reports have to date not been produced." Id. at 159.
- That "the Union's failure to produce Weekly Reports proceeded initially from Granfield's false testimony that he prepared no log of his activities on behalf of the Union" Id. at 162.
- And, that "many documents have been destroyed that related directly to events taking place during the most critical time period in this action, . . . when the Union planned its campaign against the Met." Id. at 171–72.

None of Judge Preska's findings in sanctioning the Union and its counsel appeared to be based on any conduct of Diaz. However, Judge Preska did make reference to Diaz' testimony in the instant NLRB proceeding, where Diaz had denied that he "logged what (he did) on a day to day basis . . . (his) activities on behalf of Local 100."[3] Judge Preska quoted this testimony in a footnote, after relating what she described as "falsehoods uttered by individual defendants and by Union counsel," and characterized Diaz' NLRB testimony as "similarly" to the conduct of these other Union representatives.

However, Judge Preska quoted from Diaz' deposition taken on November 15, 2001, wherein Diaz disclosed to Met Opera's counsel that he and other Union representatives filled out weekly reports of their activities. At that time, Met Opera's counsel stated that these documents should have been provided to Met Opera, pursuant to prior document requests and requested their immediate production.

There is no reference to Diaz' datebook in Judge Preska's decision, but the record discloses that the Union did provide copies of Diaz' datebook to Met Opera's counsel, in August of 2001, pursuant to a document request. Further, in response to Met Opera's written interrogatory, dated January 10, 2002, Diaz responded that "sometime after May 25, 2001, I was instructed to keep my datebook and to hand over earlier datebooks for copying. "In response to another question, Diaz responded, "Ms. Yen asked me to update by datebook just before my deposition."

[3] Judge Preska had been provided with Diaz' testimony by Met Opera's counsel.

IV. ANALYSIS

Respondent contends that the evidence demonstrates beyond question that Diaz lied and committed perjury during his testimony on July 11, 2002, by denying to Respondent the existence of his datebook, which Respondent asserts is clearly a calendar, and of his staff weekly reports, which Respondent asserts is a diary or a log of his activities, and of his Met Opera draw, which demonstrates according to Respondent that Diaz had more than one file, contrary to his prior testimony.

Respondent argues further, that once it is concluded that Diaz did in fact commit perjury as it asserts, that the entire complaint should be dismissed on policy grounds, and or because once Diaz' testimony is stricken as it should, then there is no longer any evidence in the record to support the finding of a violation.

I disagree with all of Respondent's assertions. I conclude, that Respondent has not established that Diaz committed perjury during his testimony on July 11, 2001, and that nothing disclosed at the reopened hearing warrants either the striking of Diaz' testimony, or any changes in the credibility resolutions that I made in my prior decision.

Furthermore, I conclude that even if I were to find that Diaz had committed perjury or lied during his prior testimony, none of the conclusions set forth in my prior decision would be affected, since the record contains ample evidence, including admissions by Respondent's witnesses to support the violations that I have found.

The only possible effect a finding of perjury by Diaz might have, could be concerning my factual findings as to the events of July 1, 2001. However, even if I were to discredit Diaz' testimony about that day, my findings of disparate treatment and discriminatory enforcement of Respondent's policy of excluding leafleting on the Columbus Avenue Sidewalk would not change.

With respect to the allegation made by Respondent that Diaz committed perjury on July 11, 2001, I note that title 18 U.S.C. section 621 defines perjury as testimony given "willfully and contrary to such oath," and on "any material matter which he does not believe to be true."

In my judgment, Respondent has not shown that Diaz had violated the statute in his July testimony. Thus it is not enough to establish that Diaz' testimony was inaccurate or even false. It must be proven that Diaz provided testimony that "he does not believe to be true", and that it was "willfully" contrary to his oath. In order to assess these questions it is essential to examine the context of the allegedly false responses. *Electrical Workers Local 11* (*AMCO Electrical*), 273 NLRB 183, 195 (1984); *Hunkin-Conley Construction Co.*, 100 NLRB 955, 950 (1952).

Here, although Diaz denied that he had a calendar, diary or log of his activities, all of these questions were asked in the context of extensive questioning of Diaz about the events of May 11, 2001, and his testimony concerning his overhearing Finkelstein's conversation. Thus all of the questions before and after the alleged perjurious testimony, dealt with that subject. Therefore, I find it plausible, and credible as testified to by Diaz at the reopened hearing, that Diaz believed that the questions about calendars, logs and diaries related to the issue of the overheard conversation between Finkelstein and someone else. Since none of the documents that Diaz failed to mention i.e. his datebook and his weekly reports, made any mention of this conversation, I conclude that it cannot be found that he "did not believe his testimony to be true", or that he "willfully" violated his oath to testify truthfully.

I have considered the fact, as Respondent argues, that Diaz' affidavit, prepared by the Union's attorney, in response to the motion to reopen, contains no reference to Diaz' belief that the questions related to his testimony about the Finkelstein conversation. However, I agree with General Counsel that no inconsistency has been established, but at most demonstrates that the affidavit was incomplete. Indeed, the union attorney may not asked Diaz about the issue of the context of the questioning or did not realize the significance of same and did not include it in the affidavit. Moreover, the contest of the questions is something that can, and should be examined, whether or not it appeared in Diaz' affidavit.

Similarly, the testimony give by Diaz concerning his files must also be examined in context. In that regard, once more I credit the testimony of Diaz that he believed that he was being asked about files concerning his testimony about July 1, 2000, since that was the subject of his cross-examination at the time. Therefore, since he kept only one file concerning July 1, 2000, and the leaflets that he collected on that day, he did not believe that he was being asked about his organizing files in general, or those files in the "Met Opera draw." To the extent that Respondent argues that its question related generally to documents that Respondent subpoenaed for the initial trial, its subpoena specifically referred only to documents General Counsel intended to rely on to prove that Respondent discriminated in the enforcement of the Union's rights on the Columbus Avenue Sidewalk. Thus, Diaz' "Met Opera" files would not be covered by that subpoena.

Additionally, I also find credible Diaz' testimony that even apart from the context of the questions he not believe that he was being asked about his datebook or his weekly reports. He testified that he did not view his datebook as a calendar and that when asked about a calendar he responded truthfully that the only calendar of "what was going on", was the calendar posted in the Union hall. I find this testimony plausible, and indeed supported by Diaz' responses to interrogatories of Met Opera, where he twice referred to his datebook as a datebook, and not as a calendar.

With respect to the weekly reports, Diaz again credibly testified that in his view, a diary or a log of activities, involves a detailed account of events, rather than the cursory entries that appear on the weekly reports or indeed his datebook.

Therefore, while it is certainly reasonable to characterize these documents as calendars, logs or diaries as Respondent contends, it is also plausible to construe them as Diaz testified. I conclude that such issues of semantics do not warrant a finding of perjury.

Respondent's reliance on Judge Preska's decision to support its contention that Diaz committed perjury is misplaced. Judge Preska's decision to, find sanctions against the Union and its attorneys, was not based on any conduct of Diaz. The only negative reference to Diaz, came in footnote, where Judge Pre-

ska simply noted, based apparently on Met Opera's submission of selected excerpts of the transcript, that Diaz had denied that he logged what he did on a daily basis, and analygized it to conduct of other Union officials. However, Judge Preska did not conduct a hearing prior to rendering her decision, and did not have the benefit of Diaz' explanatory testimony, which I have credited. Therefore, I cannot give any weight whatsoever, to her footnote concerning Diaz' testimony at the NLRB, even if it can be construed as an attack on Diaz' credibility.

Judge Preska did make numerous findings adverse to the Union and its officials, including findings that Granfield, the Union's president falsely testified about the existence of staff weekly reports, and that the Union failed to produce these reports to Met Opera in a timely fashion. However, I do not agree with Respondent that these findings have any bearing on Diaz' credibility in this proceeding. Respondent argues in effect that Diaz' failure to disclose the existence of his date book, weekly reports and Met Opera draw, was part and parcel of the Union's conduct in avoiding its discovery obligations in the Met Opera action. Such a contention is belied by the record.

Diaz' date books were disclosed to and furnished to Met Opera pursuant to a document request in August 2001. More importantly, the weekly reports, that other union officials had apparently lied about, were disclosed by Diaz in his deposition in November of 2001. Therefore, if Diaz was part of a union wide conspiracy to prevent these weekly reports from being disclosed, then he would not have mentioned their existence in his deposition.

Indeed, whatever the importance of these weekly reports may have been to the Met Opera Action, I conclude that neither it nor the datebook had any significant relevance to the issues before me. These documents contain only brief descriptions of Diaz' appointments or activities, and contain no significant material, that would warrant the conclusion that Diaz, would lie about these matters. In my view these documents were not "material" under the U.S. Code's definition of perjury.

I recognize in this regard, as Respondent argues that neither the date book, nor his weekly report, listed that Diaz was at Lincoln Center on July 1, 2000, and that Diaz had furnished extensive testimony to that affect in his earlier testimony. However, I find it highly improbable, that Diaz would have the sophistication to decide to lie about these two documents, in order to "cover up" his further alleged lie about the events of July 1, 2000. Indeed the record discloses that Diaz turned over to his attorney, based on Met Opera's document request, his date books shortly after May of 2001, before his testimony before me. Moreover, the date book was turned over to Met Opera, in early August, less than a month after his initial testimony in this proceeding. Therefore, Diaz knew that his date book would be disclosed to Met Opera, and presumably that it made no mention of his July 1 appearance at Lincoln Center.

Thus, Respondent's argument that Diaz simply made up his testimony that he went to Lincoln Center on July 1, 2000, and that he lied about the existence of these documents, which would contradict this testimony, is not convincing. Again, his testimony about these documents was given in the context of extensive cross-examination about the events of May 11, 200l, and I find it highly unlikely that Diaz was even thinking about his prior testimony concerning July 1, 2000, when he gave his responses to Respondent's questions.

Accordingly, I conclude based on the foregoing, that Respondent had not shown that Diaz committed perjury in his testimony of July 11, 2001, and that his testimony should not be stricken as Respondent contends.

That still leaves another issue for resolution, that even apart from whether Diaz committed perjury, whether my findings with respect to July 1, 2000, should stand, in view of the fact that neither his date book nor his weekly reports reflect his appearance at Lincoln Center on that date. This is a close question, but on balance, I conclude that no changes should be made in my prior findings.

Diaz did attempt to explain the failure of either of these documents to include a reference to Lincoln Center on July 1, 2000. He asserts that since he had no appointment to go to Lincoln Center, it was not included in his date book. Moreover, he claims that he did not include the visit in his weekly report, because he generally prepares his weekly reports from his date books. However, this explanation is not convincing, since the record reflects substantial discrepancies between the date book and the weekly reports. While these facts tend to weaken his testimony on this issue, it does not necessarily lead to the conclusion, as Respondent asserts, that Diaz made up the entire incident.

The fact is that the record does contain some corroborating evidence, particularly the leaflets that were placed in evidence, with the date July 1, 2000, written thereon. Moreover, and more importantly, Respondent adduced no contrary evidence to refute Diaz' testimony at either the original hearing or the reopened hearing. It did not call Fletcher, its agent to offer contradictory testimony to Diaz. I drew an adverse inference from the failure of Respondent to do so at the original hearing, and I do so again, with respect to its failure to produce Fletcher at the reopened hearing. Respondent knew full well that the events of July 1, 2000, were in issue at the reopened hearing. Indeed the motion and the response make clear that the documents in question related only to Diaz' testimony about his appearance at Lincoln Center on July 1, 2000. Yet Respondent, although as noted made offers of proof, in an attempt to expand the scope of the reopened hearing, which I rejected, made no attempt to call Fletcher as witness. Nor did it provide any explanation or excuse for its failure to call him. In these circumstances, I conclude that an adverse inference is appropriate, and I find that if called as a witness, Fletcher would have corroborated Diaz' testimony.[4]

Therefore, based on the above, I find no basis to change any of my prior findings concerning Diaz' testimony as to July 1, 2000, or otherwise.

Furthermore, even if I were to agree with Respondent's assertion that Diaz committed perjury during his testimony, this finding would not result in any changes in any of the conclusions made in my prior decision. In that regard, the primary issue litigated by the parties was the question of whether Re-

[4] I also note that Respondent failed to call police officer Kennedy who could also have refuted Diaz' testimony, but did not do so at either hearing.

spondent had a sufficient property interest in the Columbus Avenue sidewalk, to exclude leafleters. The issues relating to this question are not dependent on Diaz' testimony.

Respondent argues in this respect, that absent Diaz' testimony, which it believes should be stricken, there is no basis in the record for the finding of a violation. I disagree.

I credited Diaz' testimony (which was not denied by Finkelstein), that he heard tell on the phone someone to arrest the leafleters, and found that in fact Finkelstein was speaking to the police. Even apart from the adverse inference that I drew from Finkelstein's failure to testify, the record contains important corroborating evidence of this finding, namely the letter from Grubin, which establishes that on May 11, both Grubin and Finkelstein summoned the police to arrest and remove the leafleters from the Columbus Avenue sidewalk.

Moreover, Talamo testified that on May 11, he approached Diaz, ordered him to leave the sidewalk, and threatened to consult the police if he didn't leave. Talamo then requested the police to remove Diaz, but the officer declined to take any action. This conduct of Talamo, as I observed in my decision is violative of the Act, and is not dependent on Diaz' testimony.[5]

As for June 28, 2000, I did credit Diaz' testimony that on that date, Talamo approached him while he and other union officials were leafleting, and told them that they could not leaflet, because they would be in violation of a court order. Talamo added that they would be arrested if they did not leave. I further found, as Diaz testified that Talamo then spoke to a police officer, who in turn approached Diaz and told him to leave and threatened arrest for violation of a court order. Finally, I found that the police officer after discussion with Diaz, handed Diaz Talamo's card, and stated Talamo would be the complainant. Talamo did dispute this testimony of Diaz, and further testified that he did not recall any conversation with Diaz on June 28, 2000. However, even if I were to credit Talamo and discredit or strike Diaz' version of events on June 28, 2000, my ultimate conclusions would not be affected. Thus Talamo testified that on at least a half a dozen occasions, at or around June 28, 2000, he would tell Diaz that Respondent objects to Diaz leafleting on the Columbia Avenue sidewalk, and would like him to move. Diaz would refuse to move, and Talamo replied that he would consult the police about the matter. Further, Talamo then requested the police to take action to remove Diaz, and the police officer stated that he was not prepared to take any action. Thus these admissions by Talamo are more than sufficient to establish that Respondent attempted to exclude leafleters from the Columbus Avenue sidewalk, threatened to and in fact did try to have the police arrest or remove the leafleters. These actions by Respondent, which are made independent of any testimony from Diaz, are violative of the Act, unless Respondent had a sufficient property interest in the Columbus Avenue sidewalk to exclude peaceful leafleting, which I have found Respondent did not possess.

With respect to that ultimate issue, my findings concerning Respondent's property interest in the sidewalk was also not dependent at all on any of Diaz' testimony, and therefore would not change, even if Diaz' testimony was entirely discredited.

The only factual finding that I made that could be affected by the discrediting of Diaz' testimony, was my findings as to the events of July 1, 2000. It is thus conceivable, that had I found that Diaz perjured himself on July 11, 2001, that I would strike his testimony as to the events of July 1, 2000. However, such a finding would not in my judgment change my overall conclusions that Respondent disparately enforced its ban on leafleting on the Columbus Avenue sidewalk. I conclude that even absent consideration of the events of July 1, 2000, the evidence is sufficient to make this finding.

Thus, I have found that Respondent instituted a new policy, or alternatively enforced a policy previously ignored, to prohibit leafleting on the Columbus Avenue sidewalk, because Local 100 had increased its leafleting, and became "pushy" or more "aggressive." Since being "pushy" or "aggressive," does not without more, transform protected conduct of leafleting into unprotected activity, Respondent's decision to change its policy is unlawful. This conclusion is also relevant to the disparate treatment finding that I made in my prior decision, which is also supported by the events of May 11, 2000, where Respondent made no effect to evict other groups of leafleting, while attempting to remove only representatives of the Union. Further, I also relied on the comments made by Talamo to Travis on June 28, 2000, which I found evidenced discriminatory treatment of the Union, and these findings are also independent of any testimony from Diaz.

Accordingly, based on the foregoing, I would find, even without relying on any testimony of Diaz, that Respondent violated Section 8(a)(1) of the Act, as set forth in my prior decision.

Lastly, I now turn to an evaluation of the Court of Appeals decision in *Hotel Employees Local 100 v. City of New York*, 311 F.3d 534 (2d Cir. 2002). That decision, which was issued on November 18, 2002, upheld the prior ruling of Judge Duffy that Lincoln Center had the right to prohibit rallies, demonstrations, and leafleting on the Plaza. The court concluded that the Plaza is not a "traditional public forum," and therefore that Respondent's policy is "constitutionally permissible because it is both viewpoint neutral and reasonable." 311 F.3d at 539.

However, throughout its opinion, the court made repeated references to decisions some of which I cited in my decision, finding that sidewalks are traditional public fora. 311 F.3d at 544-45, 547, 549–550. *U.S. v. Grace*; 461 U.S. 171, 179–180 (1983); *Venetian Casino Resort v. Local Joint Exec. Bd.*, 257 F.3d 937, 945 (9th Cir. 2001);[6] *Hague v. CIO*, 307 U.S. 496, 515–516 (1939); *Frisby v. Schultz*, 487 U.S. 474, 479 (1988); *Perry Educ. Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 45 (1983).

[5] The fact that Talamo, as Respondent asserts, made reference to the agreement reached between the parties, when ordering Diaz to leave is not significant. As I detailed in my prior decision, for number of reasons, I concluded that the "settlement" agreement incorporated in Judge Baer's order did not provide Respondent with a sufficient property interest to exclude the leafleters from the Columbus Avenue sidewalk.

[6] In this case the Ninth Circuit held that a privately owned sidewalk was a public fora, because it functioned as a public thoroughfare.

The court, after rejecting the Union's contention that the Plaza was a public forum, then decided the case on the basis that it was either non-public or limited public forum. In such circumstances, it examined closely the reasonableness of the restrictions imposed by Respondent. In that connection, it was particularly concerned with the prohibition of leafleting in the Plaza, recognizing the heightened constitutional scrutiny placed on restrictions of leafleting. *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); *Paulsen v. County of Nassau*; 925 F.2d 65, 66 (2d Cir 1991); *Wolin v Port of N.Y. Auth.*, 392 F.2d 83, 89 (2d Cir. 1968); *Chicago Acorn v. Metro Pier & Expo.*, 150 F.3d 695, 703 (7th Cir. 1998).

The Court then distinguished these cases from the prohibition of leafleting on the Plaza, and found it to be reasonable in light of the Plaza's particular and limited function and purpose.

The opinion then made the following observation.

> This is especially so where neighboring Damrosch and Dante Park and the public sidewalks surrounding Lincoln Center, provide ample alternative venues for groups such as the Union who wish to voice their views to Lincoln Center's patron's. See *Cornelius* 473 U.S. at 809 (finding a regulation reasonable where speakers have access to alternative channels through which they can reach their intended audience.) Accordingly, we conclude that Lincoln Center Inc's policy prohibiting leafleting, also passes constitutional muster. [31 F.3d at 556.]

The parties have presented extensive arguments as to the significance of this decision in general, and the latter quotation in particular. Relevant to an assessment of these issues is a portion of the transcript of the oral argument before the circuit, consisting of an exchange between Judge Straub (who incidentally authored the opinion), and Charles Sims, attorney for Lincoln Center in that case. The transcript reads as follows:

> MR. STRAUB: Wouldn't it be one thing to prohibit a rally as opposed to having a couple of leafleters walking about?
>
> MR. SIMS: The judgment has been made. I mean, they have a security force. There is also an impact on Lincoln Center's own proprietary interests. They rely on a board and on the generosity of donors. They have tried to, and I think succeeded quite admirably, in creating an atmosphere where people feel relaxed.
>
> MR. STRAUB: Who would rather not take a leaflet and tuck it away in their tuxedo.
>
> MR. SIMS: They can take a leaflet on the sidewalk—under a recent ruling, they can take leaflets on their way, you know, down there. But the plaza itself, as the Court found, is a place apart, designed for the gathering of audience and, frankly, is a nice way to get your head together when you are going in.

The parties have stipulated in connection with this exchange, that Sims, when he made reference to a "recent ruling" in his response to Judge Straub, was referring to my decision. It was further stipulated that neither my decision nor a citation of my decision was provided to the Court.

Both the Charging Party and the General Counsel contend that the Second Circuit's decision, related above, explicitly holds that leafleting on the Columbus Avenue sidewalk is protected, and cannot be prohibited by Respondent.

Respondent on the other hand argues that the decision has little or no precedential significance to the instant case, since the court's decision was confined to regulating conduct on the Plaza. In that regard, Respondent points out that the decision made no specific findings concerning the Columbus Avenue sidewalk, and did not discuss the possible effect of the license agreement on the issue, which issue was neither litigated nor briefed to the court. Further, Respondent argues that the portion of Judge Straub's opinion which makes reference to "public sidewalks surrounding Lincoln Center," cannot mean the Columbus Avenue sidewalk, since this sidewalk is not a public sidewalk as per the license agreement. Finally, Respondent contends that even if it is found that the court was including all sidewalks, in its opinion, that at most any conclusion inferred from the quoted statement constitute "dicta" which cannot be relied upon as precedent.

With respect to the issue of what the court meant by "public sidewalks" in its opinion, I find that it is clear that the court was referring to all of the sidewalks surrounding Lincoln Center, including the Columbus Avenue sidewalk.

While as Respondent argues, the decision did at one point refer to "public areas" managed by Lincoln Center to include the Columbus Avenue sidewalk, it also included Damrosch Park in that same footnote. Thus it cannot be reasonably contended as Respondent argues that the court's reference to public sidewalks meant only the sidewalks other than Columbus Avenue. The court included Damrosch Park, Dante Park and all the sidewalks as alternative venues for leafleting, and made no distinction between these areas. Further, the exchange during oral argument between Respondent's attorney, Sims, and Judge Straub serves to confirm this conclusion. Attorney Sims, in response to Judge Straub's obvious concern about alternative venues for leafleting, stated that leaflets can be distributed on the sidewalk under a recent ruling. Since the parties have stipulated that the ruling referred to by Sims was my decision, which dealt with the Columbus Avenue sidewalk, it is clear that the Columbus Avenue sidewalk was included in the court's description of alternative venues to leaflet.

However, this conclusion does not answer the more important question of what significance to be attached to this statement by the court, as well as to the decision in general. I do not agree with Charging Party or General Counsel that the decision "resolves the issue" of whether leafleting is protected on the Columbus Avenue sidewalk, since as Respondent correctly observes, that issue was not expressly before the court, and it was not called upon to and did not make any such finding. Further, the issue of the effect of the License Agreement on the right to restrict leafleting was not litigated, briefed, nor considered by the court. Therefore, I agree with Respondent, that the statements of the court, can at most be considered "dicta."

Nonetheless, I do not agree with Respondent that "dicta" cannot be relied upon at all. In my view, the decision itself, as well as the concluding paragraph, constitutes highly persuasive

dicta, which can be considered supportive of my previous decision. I so find.

In my decision, I concluded that based on both New York law and Federal Constitutional law, peaceful leafleting cannot be prohibited by the City. Since whatever rights that Respondent has to regulate leafleting is derived from its license agreement with the City, I further concluded that Respondent as the licensee can have no greater rights than the City, to prohibit leafleting. I further found that the City, as the licensor, agreed that Respondent, notwithstanding the license agreement, cannot prohibit peaceful leafleting on the Columbus Avenue sidewalk.

In my view these findings are supported by the Court decision in general, as well as the last paragraph of the decision. The decision made several references to public sidewalks as public fora, citing many of the same cases cited in my decision. It is clear from the opinion, that it was quite concerned with the prohibition against leafleting, (as opposed to rallies and demonstrations) on the plaza.[7] Therefore, the statement made in the opinion by Judge Straub, that the public sidewalks (which I have found includes the Columbus Avenue sidewalk) provide ample alternative venues for leafleting, can be construed as at least an indication that the Court would view a prohibition on leafleting on that sidewalk as constitutionally impermissible. I so conclude, and therefore find that the Second Circuit's decision provides further support for my decision, and my conclusions with respect to the rights of Respondent to prohibit leafleting on the Columbus Avenue sidewalk. That is, the Columbus Avenue sidewalk is considered a public forum under the precedent cited in my decision, as well as the second circuit opinion, and Respondent cannot lawfully exclude the Union from peaceful leafleting there.

The Charging Party, relying on the statements made by Attorney Sims during the oral argument before the second circuit, argues that Respondent be estopped from asserting that it can prohibit leafleting on the Columbus Avenue sidewalk, because it has unfairly manipulated the judicial process. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). The Supreme Court therein applied the doctrine of judicial estoppel and set forth criteria for its assertion. First, a party's later position must be clearly inconsistent with its earlier position. Second, the party must have succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled. Third, the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment, on the opposing party if not estopped.

The Charging Party argues that all of the above criteria have been met here for the application of the doctrine, and that Respondent should be precluded from asserting that it can prohibit leafleting on the Columbus Avenue sidewalk because it played "fast and loose with the Courts." In that regard, the Charging Party notes that Respondent, at both the District Court and Circuit Court proceedings dealing with the Plaza, continually misled the courts by assuring the judges that the Union had been and would continue to be allowed to leaflet on the sidewalk, while asserting as the courts ultimately concluded that the sidewalk was one of the appropriate alternative venues for leafleting by the Union, that made Respondent's decision to ban such conduct on the Plaza a reasonable one.

Thus, it is asserted and I agree that this position taken by Respondent in that case is clearly inconsistent with the position taken by it before me, that it had the right to ban such leafleting on the sidewalk. I also agree that the evidence discloses that Respondent misled the prior judges by its statements. I note particularly Sims' reference to a prior ruling (my decision) coupled with a statement that the Union can leaflet on the sidewalk. It is significant that Sims did not mention to the court that this ruling was an administrative law judge decision, which has no precedential effect, and more importantly that Respondent disagreed with it, and as of that time, had filed the motion to reopen the hearing, in order to seek dismissal of the complaint.

However, it is not clear whether Respondent can be found to have derived an unfair advantage or imposed an unfair detriment on the opposing party, if not estopped. The Charging Party argues that in this regard, that if Respondent had candidly told the courts of its intention to ban leafleting on the sidewalk, its alternative venues argument would have been much weaker and the ban on leafleting on the Plaza would have been viewed as much less reasonable. However, these assertions are not clear from the court decision. While the court was certainly concerned about alternative venues, the sidewalk was but one of several mentioned by the court, such as Damrosch Park, Dante Park, and sidewalks other than the Columbus Avenue sidewalk. It is not at all certain, or even probable that the Court would have ruled differently, even if Respondent had disclosed its true position on banning leafleting on the Columbus Avenue sidewalk. Moreover, there is no evidence that Union relied on or took any action based on Sims' misleading statement of Respondent's position.

Further, the Board does not apply the doctrine of judicial estoppel in cases where it, has not been a party to the prior proceeding. *Fieldbridge Associates*, 306 NLRB 322, 323 (1992), enfd. 982 F.2d 845 (2d Cir. 1993). Moreover, even apart from the requirement of identity of the parties, in order to give preclusive effect to a prior decision involving a particular issue, (1) the issues in both proceedings must be identical, (2) the issue in the prior proceeding must have been actually litigated and decided, and (3) the issue previously litigated must be necessary to support a valid and final judgment on the merits. *Local 32B v Fieldbridge*, supra, 982 F.2d at 849; *PCH Associates*, 949 F.2d 585, 593 (2d Cir. 1991).

Here, the issues are clearly different in both cases, since the prior case involved conduct on the Plaza, while the instant matter concerned regulating conduct on the sidewalk. Additionally, the issue of the lawfulness of prohibiting leafleting on the sidewalk was neither litigated nor decided, and the issue of regulating conduct on the sidewalk was not necessary to support a valid and final judgment on the merits.[8]

[7] See *Krishna v. Lee*, supra, also cited in my decision.

[8] It is true as Charging Party argues that the court's opinion does suggest, as I have noted, that it would have found that prohibiting leafleting on the Columbus sidewalk does not meet constitutional muster.

Accordingly, for the above reasons, I do not deem it appropriate to apply the doctrine of collateral estoppel against Respondent and deny it the right to litigate the proprietary of its actions in prohibiting the Union from engaging in peaceful leafleting on the Columbus Avenue sidewalk.

However, I do believe that it is appropriate to consider the statements made by Sims to the court (which were similar to statements made before the District Court in affidavits and briefs), as admissions by Respondent, that it did not have the right to lawfully evict leafleters from the sidewalk. Thus when Sims made reference to my decision, in support of his statement that the union leafleters could leaflet on the sidewalk, this constitutes an admission by Respondent that my decision was correct with respect to this issue. Sims did not inform the court that Respondent believed that my conclusion that Respondent could not lawfully prohibit leafleting on the sidewalk was wrong, or that it intended to file exceptions to that conclusion. By failing to do so, Respondent has in my view implicitly agreed with that conclusion, and such conduct can be construed as an admission against Respondent. I so find.

However, it made no such explicit finding, and at most such a finding could be considered dicta.

Conclusion

In sum, I have concluded that Respondent has not established that Diaz committed perjury during his prior testimony and that no changes should be made in any of my prior factual findings.

Moreover, I also conclude, that even if Diaz' testimony is discredited, that the record fully supports all of my prior findings and conclusions of law.

Finally, I conclude that my decision is supported by the Court of Appeals decision in *Local 100 v. City of New York*, and that the statements made by attorney Sims in that case, constitutes additional admissions (similar to admissions made before the district court) against Respondent.

I therefore reaffirm all of my prior conclusions and recommend[9] issuance of the recommended Order set forth in that decision.

Dated, Washington, D.C. June 20, 2003

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.